

No. 16106 ✓

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United States  
Court of Appeals  
for the Ninth Circuit

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UNITED STATES OF AMERICA,  
Appellant.

vs.

HERBERT D. HOVER, Doing Business as Ciro's,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California  
Central Division

FILE

DEC 17 1958

PAUL P. O'BRIEN, C



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the  
Southern District of California, Central Division

No. 20853-WM

HERBERT D. HOVER, dba CIRO'S,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

## COMPLAINT FOR RECOVERY OF TAXES

Comes now the plaintiff and complains of the defendant as follows:

1.

This is an action for recovery of cabaret taxes paid by the plaintiff pursuant to an assessment entered against the plaintiff on or about November 14, 1955. Said assessment was made under Sections 1700(e) of the Internal Revenue Code of 1939 and 4231(6) and 4232(b) of the Internal Revenue Code of 1954. Jurisdiction thereof is vested in this Court by 28 U.S.C. 1340; 1346(a)(1).

2.

At all times herein mentioned, plaintiff was and now is a citizen and a resident of the County of Los Angeles in the Southern District of California. [2\*]

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.

3.

During the periods June, 1951, through March 31, 1955, Plaintiff owned and operated a restaurant and night club under the name of *Ciro's* at 8433 Sunset Boulevard, Los Angeles 46, California.

4.

During the period specified in Number 3 above, Plaintiff paid cabaret tax assessments in the total amount of Four Hundred Forty Thousand, Four Hundred Seventy-one Dollars and Thirty-eight Cents (\$440,471.38).

5.

On or about November 14, 1955, assessments over and above the Four Hundred Forty Thousand Four Hundred Seventy-one Dollars and Thirty-eight Cents (\$440,471.38) cabaret tax paid for said taxable periods were made by the District Director of Internal Revenue in the total amount of Sixty-seven Thousand Six Hundred Sixty Dollars and Sixty-two Cents (\$67,660.62).

6.

Said assessment of additional tax in the amount of Sixty-Seven Thousand, Six Hundred Sixty Dollars and Sixty-two Cents (\$67,660.62) is based upon a Revenue Agent's Report dated September 29, 1955, in which is contained an analysis of purported additional taxable sales.

7.

In said Revenue Agent's Report additional taxable sales for the "Pavillion Room" were computed

as Three Hundred Thirty-three Thousand Four Hundred Ninety-one Dollars and Eighty-six Cents (\$333,491.86); purported additional taxable sales for the "Ciroette Room" were computed to be Nine Thousand One Hundred Seventeen Dollars and Twelve Cents (\$9,117.12) and additional taxable sales for "Closed House" parties were computed to be Fifty-seven Thousand Four Hundred Two Dollars and Fifty Centy [3] (\$57,402.50).

## 8.

During the taxable periods involved, plaintiff owned and operated, separate from the main dining room, a room known as the "Pavillion Room."

## 9.

The "Pavillion Room" is on a different level and in a different building from Ciro's main room.

## 10.

When a separation wall installed between the "Pavillion Room" and the main dining room was closed, the customers in the "Pavillion Room" could not see or hear entertainment in the main room.

## 11.

During the periods herein involved, private parties were held in the "Pavillion Room" and the separation wall was closed between the two said rooms until after the groups in the "Pavillion Room" had concluded their private parties.

12.

Some guests at the private parties in the "Pavilion Room" remained in the "Pavillion Room" after the private party had been concluded.

13.

On some occasions the separation wall was opened between the "Pavillion Room" and the main room after conclusion of the private parties in the "Pavillion Room" so that patrons could view from that room, the floor show in the main room.

14.

At no time while members of the private parties in the "Pavillion Room" were viewing entertainment in the main room, did such members cease to be members of private parties. [4]

15.

At no time were the private parties held in the "Pavillion Room" open to the public.

16.

Rest Room accommodations for patrons in the "Pavilion Room" during the period here involved, were separate from the Rest Room accommodations for the main room.

17.

The hours of service and the wage scale are different for waiters serving in the "Pavillion Room" and in the main room and waiters serving in the

“Pavillion Room” usually finished between 8:00 p.m. and 9:00 p.m. but in no event stayed after 10:00 p.m.

18.

The “Pavillion Room” has a separate entrance from the main room.

19.

The parking lot arrangements are different for the patrons of the “Pavillion Room” and the main room.

20.

There is a difference in menus for the meals served in the “Pavillion Room” and in the main room.

21.

Under union rules, waiters in the “Pavillion Room” were permitted to serve no more than twenty (20) patrons, whereas waiters in the main room were permitted to serve an unlimited number of patrons.

22.

Members of private parties held in the “Pavillion Room” were charged different from patrons who were served in the main room.

23.

The examining officers determined that 94% of the “Pavillion Room” receipts were subject to cabaret tax. [5]

## 24.

A cabaret tax of 20/120% was applied to the purported additional taxable sales stated in Paragraph 23 above which tax totaled Fifty-five Thousand Five Hundred Eighty-one Dollars and Ninety-six Cents (\$55,581.96).

## 25.

In determining the taxability of sales in the "Pavillion Room" the examining officers found as follows:

"The Pavillion Room is adjacent to the main dining room and capable of being separated from the main room by a sliding, accordion-like wall. When the sliding wall is drawn back, patrons in the Pavillion Room can view the entertainment which is presented in the main room. Private parties are frequently held in this room and at the time the entertainment commences in the main room, the sliding wall is retracted so that these private groups view the same show that is presented for patrons in the main room."

## 26.

Cabaret tax was neither collected from, nor passed on to organizations or members of private parties who were served in the "Pavillion Room."

## 27.

Plaintiff owned and operated a room called the "Ciroette Room" on the second floor of Ciro's.



28.

Patrons served in the "Ciroette Room" could observe or participate in the entertainment in the main room only by going down a flight of stairs and passing through at least two doorways.

29.

The "Ciroette Room" has separate Rest Room accommodations.

30.

In determining the taxability of sales in the "Ciroette Room" the examining officers concluded that 5% of the "Ciroette Room" receipts were subject to cabaret tax and computed such tax [6] to be a total of One Thousand Five Hundred Nineteen Dollars and Fifty-two Cents (\$1,519.52).

31.

Plaintiff neither collected from nor passed on to customers in the "Ciroette Room" the cabaret tax assessed against him for charges, sales or service in the "Ciroette Room."

32.

The examining officers determined that receipts in the amount of Fifty-seven Thousand, Four Hundred Two Dollars and Fifty Cents (\$57,402.50) from private parties, hereinafter called "Closed House" parties, held from time to time at Ciro's, were subject to cabaret tax.

33.

The amount of cabaret tax computed on "Closed House" private parties was Nine Thousand Five

Hundred Sixty-seven Dollars and Eight Cents (\$9,567.08).

34.

“Closed House” private parties were conducted by various organizations which charged members specified prices which were paid to the organizations by the members.

35.

When “Closed House” parties were held, *Ciro’s* was closed to the public.

36.

In some instances the organizations conducting the “Closed House” parties used the same entertainment as that currently appearing at *Ciro’s* at the time the party was given and in other instances, such organizations provided their own entertainment.

37.

The examining officers in determining that “Closed House” parties were subject to cabaret tax deemed such parties to be the [7] same as the reservation of one or two tables at *Ciro’s*.

38.

In nearly all instances, the private organizations conducting “Closed House” parties paid for the entertainment directly to the entertainers themselves.

39.

In nearly all instances, the private organizations conducting the “Closed House” parties made payment for dinner and beverages directly to plaintiff.



40.

Ciro's had, during the period here involved, separate checking facilities for the "Ciroette Room," "Pavillion Room" and the main room.

41.

On information and belief, hotels, restaurants and night clubs locally and nationally, generally have not in the past collected, and do not now collect, cabaret tax on services and sales such as those on which assessment was made herein.

42.

Defendant's agents, upon various audits of plaintiff's cabaret tax returns, deemed "Pavillion Room," "Ciroette Room" and "Closed House" party sales not to be subject to cabaret tax.

43.

In no instance was cabaret tax collected from or passed on to organizations conducting "Closed House" parties nor to the patrons thereof.

44.

The schedule attached hereto as Exhibit "A" and made a part hereof shows the amount of additional tax assessed for the various taxable periods from June, 1951, to the first quarter of 1955, inclusive. [8]

45.

On or about August 2, 1956, plaintiff paid Three Hundred Dollars (\$300.00) on the above assessment.

46.

On or about August 2, 1956, a Claim for Refund in the amount of Three Hundred Dollars (\$300.00) was filed by plaintiff, and on or about September 20, 1956, an amended claim was filed to correct a typographical error. Copies of said claim and amended claim are attached hereto as Exhibit "B."

47.

On or about December 6, 1956, a Notice of Disallowance of Claim was received by plaintiff. Copy of said Disallowance of Claim is attached hereto as Exhibit "C."

48.

Assessments made for the taxable periods ended more than four (4) years prior to the date of assessment herein, are invalid because of the prohibition of such assessment by Section 3312(a) of the Internal Revenue Code of 1949.

49.

Defendant has, at all times, failed or refused to refund the aforesaid cabaret taxes in the amount of Three Hundred Dollars (\$300.00).

50.

By virtue of the foregoing, the United States became and is now indebted to the plaintiff in the amount of Three Hundred Dollars (\$300.00) with interest as provided by law.

Wherefore, plaintiff claims judgment against the defendant in the amount of Three Hundred Dollars (\$300.00) with interest thereon as provided by law.

/s/ ERNEST R. MORTENSON,  
Attorney for Plaintiff. [9]

EXHIBIT A

(Copy)

Name and Address of Taxpayer:

Herbert D. Hover dba Ciro's  
8433 Sunset Blvd.  
Los Angeles 46, California

Date of Report: 9-29-55

Examining Officers: B. J. O'Connor  
Chester M. Ross

Statement of Excise Tax Liability by Months

Month and Year	Correct Liability	Previously Assessed	Additional Tax Overassessment Interest
6-51 Tax Pen. ....	\$ 6,259.86	\$ 6,223.40	\$ 36.46
7-51 Tax Pen. ....	12,010.39	11,993.20	17.19
8-51 Tax Pen. ....	6,160.61	6,133.55	27.06
9-51 Tax Pen. ....	10,150.23	10,124.28	25.95
10-51 Tax Pen. ....	8,938.38	8,892.40	45.98
11-51 Tax Pen. ....	9,698.07	9,661.80	36.27
12-51 Tax Pen. ....	8,777.77	8,701.80	75.97
1-52 Tax Pen. ....	9,202.23	8,586.60	615.63
2-52 Tax Pen. ....	8,503.61	7,802.40	701.21
3-52 Tax Pen. ....	9,222.04	8,766.60	455.44

## Statement of Excise Tax Liability by Months

Month and Year	Correct Liability	Previously Assessed	Additional Tax Overassessment Interest
4-52 Tax Pen. ....	\$ 8,248.02	\$ 7,054.40	\$ 1,193.62
5-52 Tax Pen. ....	15,008.10	13,393.80	1,614.30
6-52 Tax Pen. ....	11,284.41	8,615.20	2,669.21
7-52 Tax Pen. ....	8,722.63	7,999.91	722.72
8-52 Tax Pen. ....	9,425.93	8,800.20	625.73
9-52 Tax Pen. ....	11,625.67	9,972.00	1,653.67
10-52 Tax Pen. ....	17,521.62	16,239.80	1,281.82
11-52 Tax Pen. ....	9,040.93	5,752.79	3,288.14
12-52 Tax Pen. ....	11,124.05	8,069.40	3,054.65
1-53 Tax Pen. ....	14,523.05	12,712.00	1,811.05
2-53 Tax Pen. ....	10,143.94	8,015.20	2,128.74
3-53 Tax Pen. ....	11,599.70	9,624.17	1,975.53
4-53 Tax Pen. ....	12,808.50	11,257.80	1,550.70
5-53 Tax Pen. ....	14,093.66	11,930.65	2,163.01
6-53 Tax Pen. ....	11,164.71	9,321.62	1,843.09
3-53 Tax Pen. ....	30,935.52	28,424.38	2,511.14
4-53 Tax Pen. ....	35,067.49	26,995.32	8,072.17
1-54 Tax Pen. ....	33,053.63	27,510.99	5,542.64
2-54 Tax Pen. ....	30,835.16	25,577.08	5,258.08
3-54 Tax Pen. ....	36,853.95	34,270.82	2,583.13
4-54 Tax Pen. ....	31,993.74	24,683.52	7,310.22
1-55 Tax Pen. ....	44,134.40	37,364.30	6,770.10
	<hr/>	<hr/>	<hr/>
	\$508,132.00	\$440,471.38	\$ 67,660.62
	<hr/> <hr/>	<hr/> <hr/>	<hr/> <hr/>

EXHIBIT B

Form 843

U. S. Treasury Department,  
Internal Revenue Service

Claim

Kind of claim filed:

Refund of Taxes Illegally, Erroneously, or Ex-  
cessively Collected.

Name of taxpayer or purchaser of stamps:

Herbert D. Hover, d/b/a Ciro's.

Number and street:

8433 Sunset Boulevard.

City, town, postal zone, State:

Los Angeles 46, California.

1. District in which return was filed:

Los Angeles.

2. Name and address shown on return, if different  
from above:

Same.

3. Period—If for tax reported on annual basis,  
prepare separate form for each taxable year:

From April 1, 1951\*, to April 30, 1951\*.

4. Kind of tax:

Cabaret.

5. Amount of assessment:

\$1,193.62.

Dates of payment:

August 2, 1956.

\* \* \*

7. Amount to be refunded:

\$300.00.

\* \* \*

9. The claimant believes that this claim should be allowed for the following reasons:

See Rider Attached Hereto and Made a Part Hereof

---

[\*Corrected to read 1952 on original—see Amended Claim, page 19 of printed record.]

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated: August 2, 1956.

/s/ HERBERT D. HOVER,  
d/b/a Ciro's;

By /s/ ERNEST R. MORTENSON,  
Attorneys in Fact. [12]

Instructions

\* \* \*

Herbert D. Hover, d/b/a Ciro's  
Rider Attached to Form 720

A "Monthly Amended Federal Excise Tax Return" (Form 720) was filed by mail August 2, 1956, by taxpayer in which tax was reported as follows:

"Examining officers, B. J. O'Conner and Chester M. Ross, in a report dated September 29, 1955, computed additional tax due for the month of April, 1952, as follows:

Cabaret Tax Reported Taxable Sales Tax Included	Additional Taxable Sales Pavillion Room	Additional Taxable Sales Ciroette Room	Additional Taxable Sales "Closed House" Parties
\$42,362.40	\$ 5,017.49	\$ 194.13	\$ 1,950.10

Corrected Taxable Sales Tax Included	Cabaret Tax Due 20 x Col. 6 120	Total Tax Due
\$49,488.12	\$ 8,248.02	\$ 8,248.02

On taxpayer's original tax return for the month of April, 1952, the tax assessed was \$7,054.40, therefore according to the examining officers' report, there is an additional tax due and owing of \$1,193.62. Taxpayer does not believe he is subject to any additional cabaret tax. He considers the interpretation to be erroneous under which the additional deficiency has been determined.

Accordingly, this return is being filed without conceding the validity of the rulings, interpretations or computations relied upon by the District Director of Internal Revenue.



Taxpayer paid to the District Director of Internal Revenue three hundred dollars (\$300.00) at the time of filing said return.

Taxpayer asserts as grounds for this claim that he did not maintain in the Ciroette Room, nor for so-called "Closed House" parties any roof garden, cabaret, or similar place furnishing a public performance for profit, by or for any patron or guest within the meaning of Section 1700(e) of the 1939 Code or Sections 4231 (6) and 4233 (b) of the 1954 Code. [13]

Taxpayer contends that the tax was imposed on persons who neither witnessed nor were present at any taxable entertainment.

The tax was erroneously assessed on charges for service and refreshment to persons who were not patrons or guests admitted to a place furnishing a public performance for profit.

In addition to his contention that there is no factual basis for the assessment, taxpayer asserts that the regulations and rulings under which the cabaret tax was assessed on charges in the Pavillion Room, the Ciroette Room and on "Closed House" parties are an erroneous interpretation of Section 1700(e) of the 1939 Code, are in conflict with Court decisions and are invalid.



U. S. Treasury Department,  
Internal Revenue Service

Form 843

Amended Claim

Kind of claim filed:

Refund of Taxes Illegally, Erroneously, or Ex-  
cessively Collected.

Name of taxpayer or purchaser of stamps:

Herbert D. Hover, d/b/a Ciro's.

Number and street:

8433 Sunset Boulevard.

City, town, postal zone, State:

Los Angeles 46, California.

1. District in which return was filed:

Los Angeles.

2. Name and address shown on return, if different  
from above:

Same.

3. Period:

From April 1, 1952, to April 30, 1952.

4. Kind of tax:

Cabaret.

5. Amount of assessment:

\$1,193.62.

Dates of payment:

August 2, 1956.

\* \* \*

7. Amount to be refunded:  
\$300.00.

\* \* \*

9. The claimant believes that this claim should be allowed for the following reasons:

(This Amended claim is filed to correct a typographical error in the original dated August 2, 1956. The original claim under Item No. 3 gives the period as "April 1, 1951, to April 30, 1951." This has been corrected as shown above.)

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated: September 20, 1956.

/s/ HERBERT D. HOVER,  
d/b/a Ciro's;

By /s/ ERNEST R. MORTENSON,  
Attorney in Fact. [15]

Instructions

\* \* \*

EXHIBIT C

U. S. Treasury Department  
Internal Revenue Service  
District Director  
Los Angeles 12, Calif.

December 5, 1956.

Mr. Herbert D. Hover,  
d/b/a Ciro's.  
c/o Ernest R. Mortenson,  
3826 East Colorado,  
Pasadena 8, California.

Claim for Refund of \$300.00.

Taxable Period: 4/1/52 to 4/30/56.

In accordance with the provisions of Section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

/s/ R. A. RIDDELL,  
District Director.

Registered Mail 154740.

Duly verified.

[Endorsed]: Filed December 21, 1956. [16]

[Title of District Court and Cause.]

AMENDED ANSWER AND COUNTERCLAIM  
FOR COLLECTION OF CABARET TAXES

Comes Now the defendant, United States of America, and pursuant to stipulation and order of June 21, 1957, files this, its amended answer to plaintiff's complaint and counterclaim for collection of cabaret taxes, and admits, denies and alleges as follows:

Amended Answer

1.

Admits the allegations of the first two sentences of paragraph 1. Denies that jurisdiction of this action is vested in this Court.

2.

Admits the allegations of paragraph 2. [30]

3.

Admits the allegations of paragraph 3.

4.

Admits the allegations of paragraph 4.

5.

Admits the allegations of paragraph 5.

6.

Admits the allegations of paragraph 6, but it is denied that the sales were not taxable.

7.

Admits the allegations of paragraph 7, but it is denied that any of the sales were not taxable.

8.

Admits the allegations of paragraph 8, but it is denied that the "Pavillion Room" was "separate from the main dining room" or was operated "separate from the main dining room."

9.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 9 of the complaint.

10.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10 of the complaint.

11.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11 of the complaint.

12.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12 of the complaint. [31]

13.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13 of the complaint.

14.

Denies the allegations of paragraph 14.

15.

Denies the allegations of paragraph 15.

16.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 of the complaint.

17.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17 of the complaint.

18.

Denies the allegations of paragraph 18.

19.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 19 of the complaint.

20.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 20 of the complaint.

21.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21 of the complaint.

22.

Denies the allegations of paragraph 22. [32]

23.

Admits the allegations of paragraph 23.

24.

Admits the allegations of paragraph 24, but it is denied that the sales were not taxable.

25.

Admits the allegations of paragraph 25, but it is denied that the alleged findings were the only findings upon which the taxability of the sales was determined.

26.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 26 of the complaint.

27.

Admits the allegations of paragraph 27.

28.

Admits the allegations of paragraph 28.

29.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 29 of the complaint.

30.

Admits the allegations of paragraph 30.



31.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 31 of the complaint.

32.

Admits the allegations of paragraph 32, except denies the parties were private.

33.

Admits the allegations of paragraph 33, except denies [33] the parties were private.

34.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 34 of the complaint.

35.

Denies the allegations of paragraph 35.

36.

Admits the allegations of paragraph 36, but denies the allegation that the organizations referred to provided their own entertainment.

37.

Admits the allegations of paragraph 37.

38.

Denies the allegations of paragraph 38.



39.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 39 of the complaint.

40.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 40 of the complaint.

41.

Denies the allegations of paragraph 41.

42.

Denies the allegations of paragraph 42.

43.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 43 of the complaint. [34]

44.

Admits the allegations of paragraph 44.

45.

Admits the allegations of paragraph 45.

46.

Admits the allegations of paragraph 46.

47.

Admits the allegations of paragraph 47.

48.

Denies the allegations of paragraph 48.

49.

Admits the allegations of paragraph 49.

50.

Denies the allegations of paragraph 50.

### Counterclaim

For a Counterclaim to Plaintiff's Complaint Herein,  
Defendant Alleges as Follows:

1.

On November 14, 1955, the authorized delegate of the Secretary of the Treasury assessed against the plaintiff, Herbert D. Hover, d/b/a *Ciro's*, cabaret taxes for the monthly periods June 1, 1951, through June 30, 1953, and for the quarterly periods July 1, 1953, through March 31, 1955, in the sum of \$67,660.62 taxes and \$7,858.51 interest, for a total assessment of \$75,519.13; notice of the assessment of said tax and interest was given to the plaintiff and demand for the payment thereof was made upon him on November 16, 1955; on August 7, 1956, the sum of \$300.00, and no more, was paid; with respect to said assessment there remains due, owing and unpaid to the United States of America the balance of the assessment in the sum of \$75,219.13, together with accrued interest thereon according to law, which amounted to [35] the sum of \$6,599.44 on June 30, 1957, and which continues to accrue at the statutory rate of six per centum per annum, or \$12.36 per day, thereafter.

## 2.

The taxes assessed against the plaintiff as alleged in paragraph 1 were equivalent to 20% of all the amounts paid during said periods for admission, refreshment, service or merchandise to plaintiff by or for any patron or guest of the plaintiff's establishment in the portions of plaintiff's establishment referred to as the Pavillion Room and Ciroette Room, and for the entire establishment on those occasions in which the facilities of the establishment were made available to one organization exclusively.

## 3.

Throughout said period plaintiff furnished to the said patrons or guests of the facilities set forth in paragraph 2 herein, by or for whom the said payments were made, public performances for profit such as dancing to orchestral music, singing, comedy entertainment, as well as other varied types of entertainment.

## 4.

Plaintiff, by reason of the aforesaid assessment, is indebted to the defendant in the sum of \$81,-819.07 together with interest at the rate of \$12.36 per day from July 1, 1957, until paid, and defendant is entitled to judgment against the plaintiff for said amount.

Wherefore, defendant prays for judgment as follows:

(1) That the complaint be dismissed with prejudice and it be adjudged and decreed that plaintiff take nothing from the defendant;

(2) That defendant have judgment against [36] plaintiff for the sum of \$81,819.07, together with interest at the rate of \$12.36 per day from July 1, 1957, until paid; and

(3) That defendant have its costs and disbursements of this action.

LAUGHLIN E. WATERS,  
United States Attorney;

EDWARD R. McHALE,  
Assistant United States At-  
torney, Chief, Tax Division;

/s/ EDWARD R. McHALE,  
Attorneys for Defendant,  
United States of America.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 4, 1957. [37]

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[Title of District Court and Cause.]

### REPLY TO COUNTERCLAIM

Plaintiff, for reply to the counterclaim of the defendant set forth in paragraphs 1 to 4 of the Answer filed herein, says:

#### 1.

Replying to paragraph 1 of said counterclaim, plaintiff admits the allegations therein except that plaintiff denies that there remains due, owing and unpaid to the United States of America the balance

of the assessment in the sum of Seventy-five thousand Two Hundred Nineteen Dollars and Thirteen Cents (\$75,219.13) together with accrued interest.

2.

Replying to paragraph 2 of said counterclaim, plaintiff admits that the assessment was computed on the basis of 20% of certain amounts paid during said periods for admission, refreshment service or merchandise, but denies that plaintiff's [55] establishment was subject to the tax assessed.

3.

Replying to paragraph 3 of said counterclaim, plaintiff denies the allegations therein.

4.

Replying to paragraph 4 of said counterclaim, plaintiff denies the allegations therein.

Wherefore, plaintiff demands that defendant's counterclaim be dismissed and that he be awarded judgment as prayed in the Complaint.

/s/ ERNEST R. MORTENSON,  
Attorney for Plaintiff.

Dated: 9th day of Sept., 1957.

Receipt of copy acknowledged.

[Endorsed]: Filed September 10, 1957. [56]

[Title of District Court and Cause.]

# GOVERNMENT'S ANALYSIS OF STIPULATION JOINT EXHIBIT 2-B

Joint Exhibit 2-B to the stipulation is a concise summary of taxpayer's records of 304 banquets held in the Pavillion Room during the period involved.

For the convenience of the Court, defendant has analyzed the comments appearing in the contracts for the various parties and has summarized them. The following is a summary of the number of times the various comments appear in the comment column of said exhibit:

Code-Comment Column	No. of Times Appearing
A. None .....	3
B. No dance floor or music piped in.....	0
C. Provide own show.....	1
D. All women .....	1
E. All men .....	18
F. Music from main room piped in.....	17
G. Music from main room piped in for dancing.	253
H. Orchestral music piped in.....	6
I. See show .....	37
J. I'll inform you what show will appear.....	1
K. At show time accordion wall folds back for party to see show.....	4
L. Move to main entertainment room without charge .....	1
M. No dancing .....	18
N. Dancing .....	5



O.	Additional charge of \$1.00 conditioned on presence of Sophie Tucker or similar entertainment .....	0
P.	Some of guests play cards after dinner.....	4
Q.	\$1.00 per person cover for reservation for main room to see first show.....	0
R.	Own orchestra .....	1
S.	Tax after entertainment starts.....	2
T.	Business until show time, then see show...	2
U.	Stay until closing of Ciro's.....	0
V.	Bar open until closing of Ciro's.....	125
W.	Bridge tables .....	1
X.	.....; Time at which drink price to be raised (10:00) .....	4
	(10:30) .....	3
Y.	Drink price raised at show time.....	257
Z.	If room, will see show.....	0
AA.	See first show.....	11
BB.	See second show.....	2
CC.	Piano in Pavillion Room.....	1

The material and pertinent facts appearing from said summary are as follows: [83]

(1) That for almost all of the parties it was contemplated between Ciro's and the persons arranging the parties that the group would see the floor show. For instance, there are 37 specific comments, I, "See show"; there is 1 specific comment, J, "I'll inform you what show will appear"; there are 4 comments, K, "At show time accordion wall folds back for party to see show"; there is 1 comment, L, "Move to main entertainment room with-

out charge"; there are 2 comments, S, "Tax after entertainment starts"; there are 2 comments, T, "Business until show time, then see show"; there are 11 comments, AA, "See first show"; there are 2 comments, BB, "See second show"; there are 7 comments, X, ".....; Time at which drink price to be raised"; and there are 257 comments, Y, "Drink price raised at show time." In all, these contractual arrangements indicating that the groups would see the show, total 314.

(2) On the other hand, there is but one comment, C, "Provide own show," from which it can be reasonably inferred that the group did not participate or witness the entertainment. There are one or two other occasions on which it possibly could be inferred that the group did not witness the entertainment, such as, A, in which there was no comment on three occasions; R, "Own orchestra" on one occasion; and, possibly, P, "Some of guests play cards after dinner," on four occasions; and W, "Bridge tables" on one occasion. However, it will be noted that the assessment is based only on 96% of the receipts of the Pavillion Room, and the small number in which it might reasonably be inferred that the guests did not witness the floor show would not represent more than 4% of the gross receipts.

(3) There is one matter of particular significance the Government wishes to call to the Court's attention. There are 257 occasions on which the drink price was raised from 75 cents at dinner time



to 90 cents at show time. This is an increase of 20%. The federal cabaret tax was 20%. However, the evidence will show that no part of this 20% increase in price of the alcoholic beverages [84] sold to the patrons of the Pavillion Room was paid over to the Federal Government as cabaret taxes.

Respectfully submitted,

LAUGHLIN E. WATERS,  
United States Attorney;

EDWARD R. McHALE,  
Assistant United States At-  
torney, Chief, Tax Division;

/s/ EDWARD R. McHALE,  
Attorneys for Defendant,  
United States of America.

[Endorsed]: Filed December 19, 1957. [85]

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[Title of District Court and Cause.]

### STIPULATION RE COMPUTATION

Pursuant to the request of the Court that the parties agree in advance on computations in the event of a court decision on one theory of the case,

It Is Hereby Stipulated by and between the parties hereto through their respective counsel of record, with respect to the Pavillion Room, subject to

the objections of materiality and relevancy, as follows:

1. That the serving of food was completed in every instance prior to 10:30 p.m.

2. That plaintiff does not have retained records showing either the time when cash sales of refreshments were made or what proportion of drinks were sold before and after the drink price was advanced from 75c to 90c, for the evenings involved. [86]

3. For the purposes of this stipulation, the parties have agreed in the event it becomes necessary for this Court's judgment, based on the facts known to the parties set forth in the evidence, e.g., as to the duration of the parties, that two-thirds of the refreshments were served to the patrons of the Pavillion Room before show time of 10:30 p.m. and one-third thereafter.

4. That this stipulation is not a stipulation as to the time when payments were made for either food or refreshments.

5. Based on the foregoing paragraphs, it is stipulated if it becomes necessary for the Court's decision, taking into consideration that 6% of the amounts paid for admissions, refreshments, service or merchandise were not treated as taxable, that with respect to the \$55,581.98 tax assessed [Plaintiff's Exhibit 1], \$39,980.08 would represent tax on food served, \$5,200.63 would represent tax on beverages served after 10:30 p.m., and \$10,401.27 would represent tax on beverages served prior to 10:30 p.m.

Dated: December 23, 1957.

/s/ ERNEST R. MORTENSON,  
Attorney for Plaintiff.

LAUGHLIN E. WATERS,  
United States Attorney;

EDWARD R. McHALE,  
Assistant United States At-  
torney, Chief, Tax Division;

/s/ EDWARD R. McHALE,  
Attorneys for Defendant.

[Endorsed]: Filed December 26, 1957. [87]

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[Title of District Court and Cause.]

MINUTES OF THE COURT, DEC. 19, 1957

At: Los Angeles, Calif.

Present: Hon. Irving Kaufman, District Judge.  
Counsel for Plaintiff Ernest R. Mortenson.  
Counsel for Defendant: Edward R. Mc-  
Hale, Assistant U. S. Attorney.

Proceedings:

For Court trial. Court convenes at 10:12 a.m.  
Council for both sides answer ready. Court orders  
trial proceed.

Counsel for plaintiff makes opening statement.  
Attorney for Gov't makes opening statement.  
Court declares a recess at 11:00 a.m. Court recon-

venes at 11:07 a.m. Counsel for both sides answer ready. Court orders trial proceed.

Plf's Ex. 1, 2, 3-A, 3-B, 3-C, 3-D, 4-A, 4-B, and 4-C, heretofore marked for ident., are now admitted in evidence.

Plf's Ex. 5 is marked for ident. and admitted in evidence.

Herbert D. Hover is called, sworn, and testifies in his own behalf as plaintiff.

Plf's Ex. 6 is marked for ident. and admitted in evidence.

Plf's Ex. 7 is marked for ident. and admitted in evidence.

Court declares a recess at 12:05 p.m.

Filed Government's analysis of stipulated joint exhibit.

Court reconvenes at 2:00 p.m. Counsel for both sides answer ready. Court orders trial proceed.

Attorney Mortenson makes explanatory statement.

Witness Hover, heretofore sworn, resumes the stand and testifies further.

Plf's Ex. 8 is marked for ident. only.

Plf's Ex. 6-A is marked for ident. and admitted in evidence.

Court, counsel, and witness confer on Exhibit 8.

Court declares a recess at 2:40 p.m. to reconvene at Ciro's.

Filed plaintiff's supplemental memo. of law.

Court reconvenes at 3:30 p.m. at Ciro's for inspection of premises. Counsel for both sides, Wit-

ness Hover, reporter, and deputy clerk are present.  
Court orders conference re inspection to proceed.

At 4:00 p.m. It Is Ordered that cause is continued  
to Dec. 20, 1957, 10:00 a.m., for further Court trial.  
Court adjourns.

JOHN A. CHILDRESS,  
Clerk;

By /s/ IRWIN YOUNG,  
Deputy Clerk. [96]

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[Title of District Court and Cause.]

MINUTES OF THE COURT, DEC. 20, 1957

Present: Hon. Irving R. Kaufman, District Judge.  
Counsel for Plaintiff: Ernest R. Morten-  
son.

Counsel for Defendant: Edward R. Mc-  
Hale, Assistant U. S. Attorney.

Proceedings:

For further Court trial. Court convenes at 10:05  
a.m. Counsel for both sides answer ready. Court  
orders trial proceed.

Witness Hover, heretofore sworn, resumes the  
stand and testifies on cross-examination.

Deft's Ex. A is marked for ident. and admitted  
in evidence.

Vincent Johnson is called, sworn, and testifies on  
behalf of defendant.

Deft's Ex. B is marked for ident. and admitted in evidence.

Court recesses at 10:55 a.m. Court reconvenes at 11:10 a.m. Counsel for both sides answer ready. Court orders trial proceed.

Frederick C. Payne is called, sworn, and testifies on behalf of defendant.

Deft's Ex. C is marked for ident. only.

Court and counsel argue.

Witness Francis V. McGinley is called, sworn, and testifies on behalf of defendant.

Deft's D is marked for ident.

Deft's Ex. E is marked for ident. and admitted in evidence.

James R. Westengard is called, sworn, and testifies on behalf of defendant.

Court and counsel confer on possible stipulation to eliminate necessity of calling certain witnesses following a substantially similar line of testimony.

Deft's Ex. F is marked for ident. and admitted in evidence.

Court recesses at 11:55 a.m.

Court reconvenes at 2:02 p.m. Counsel for both sides are present. Court orders trial proceed.

Filed stipulation (as Deft's Ex. G, which is marked for ident. and received in evidence) re testimony and excuse of witnesses pursuant to oral stipulation.

Marvin E. Stephens is called, sworn, and testifies on behalf of defendant.

Deft's Ex. H is marked for ident. and admitted in evidence.



Deft's Ex. H-1 is marked for ident. and admitted in evidence.

Witness Hover resumes the stand and testifies further.

Plaintiff rests.

Glen H. Harker is called, sworn, and testifies on behalf of defendant.

Raymond J. Schiever is called, sworn, and testifies on behalf of defendant.

At 2:35 p.m. court recesses. Court reconvenes at 3:15 p.m. Counsel for both sides are present. Court orders trial proceed.

Court makes a statement and counsel discuss preparation of stipulation re amount of tax, depending upon ruling of the Court.

Herman Kroll is called, sworn, and testifies on behalf of defendant.

Deft's Ex. I is marked for ident.

Dolores Miller is called, sworn, and testifies on behalf of defendant.

Deft's Ex. J-1 through J-9 are marked for ident. and admitted in evidence.

It Is Ordered that cause is continued to Dec. 23, 1957, 10:00 a.m., for further trial.

Court adjourns at 4:10 p.m.

JOHN A. CHILDRESS,  
Clerk;

By /s/ IRWIN YOUNG,  
Deputy Clerk. [97]

[Title of District Court and Cause.]

MINUTES OF THE COURT, DEC. 23, 1957

Present: Hon. Irving R. Kaufman, District Judge.  
Counsel for Plaintiff Ernest R. Mortenson.

Counsel for Defendant: Edward R. McHale, Assistant U. S. Attorney.

Proceedings:

For further Court trial. Court convenes at 10:05 a.m. Counsel for both sides are present. Court orders trial proceed.

Warren Penn is called, sworn, and testifies on behalf of defendant.

Deft's Ex. K is marked for ident. and admitted in evidence.

Sol. Hirschhorn is called, sworn, and testifies on behalf of defendant.

Deft's Ex. L is marked for ident. and admitted in evidence.

David S. Greenberg is called, sworn, and testifies on behalf of defendant.

Deft's Ex. O and P are marked for ident. and admitted in evidence.

Counsel stipulate orally as to taxable "closed" houses.

Chester M. Ross is called, sworn, and testifies for defendant.

Gov't rests.

Plf's Ex. 9 is marked for ident.



It Is Ordered that cause is continued to 10:00 a.m., Dec. 26, 1957, for further Court trial.

Court adjourns at 10:50 a.m.

JOHN A. CHILDRESS,  
Clerk;

By /s/ IRWIN YOUNG,  
Deputy Clerk. [98]

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[Title of District Court and Cause.]

MINUTES OF THE COURT, DEC. 26, 1957

Present: Hon. Irving R. Kaufman, District Judge.  
Counsel for Plaintiff: Ernest R. Mortensen.

Counsel for Defendant: Edward R. McHale, Assistant U. S. Attorney.

Proceedings:

For further Court trial.

Court convenes at 10:02 a.m. Counsel for both sides answer ready. Court orders trial proceed.

Counsel discuss stipulation and It Is Ordered that stipulation re computation be filed.

Attorney Mortensen makes final argument.

Court recesses at 10:50 a.m. Court reconvenes at 11:00 a.m. Counsel for both sides answer ready. Court orders trial proceed.

Attorney McHale makes final argument.

Attorney Mortensen makes rebuttal argument.  
Court makes a statement.

Court Orders that the cause stand submitted.

JOHN A. CHILDRESS,  
Clerk;

By /s/ IRWIN YOUNG,  
Deputy Clerk. [99]

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[Title of District Court and Cause.]

### OPINION

Irving R. Kaufman, D. J.

This suit was originally brought by plaintiff, proprietor of *Ciro's*, a nightclub, for refund of \$300 paid pursuant to a deficiency of \$67,660.62 in cabaret taxes assessed against him for the period between June 1, 1951 and March 31, 1955. Defendant has counterclaimed for \$75,219.13, the unpaid balance of said assessment and interest.<sup>1</sup>

*Ciro's*, located on Sunset Boulevard in Los Angeles, is subdivided into three rooms in which the services and facilities of the Club are offered to the public. In addition to the main entertainment and dining room, hereinafter referred to as the "Main

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<sup>1</sup>Of the original assessment of \$67,660.62, \$992 by stipulation is conceded to be owing and not in issue in this suit.

Room," there are the "Pavillion" and "Ciroette" rooms. A lounge or cocktail bar located adjacent to the Main Room also serviced Ciro's patrons but its operations are not involved in this suit. In issue in this proceeding are the taxability of receipts from (1) the Pavillion Room, (2) the Ciroette Room and (3) the "closed house parties"—when the entire club was closed to the public and reserved for the exclusive use of private organizations. [101] In the interest of simplicity and organization, I shall discuss separately these three operations forming the basis of the tax.

### Pavillion Room

The Pavillion Room is located adjacent to the lounge (which is basically a raised extension of the Main Room) and is separated therefrom by a movable wall and thick, soundproof curtain. It is undisputed that this room was used primarily to accommodate private organizations which desired to reserve for the evening such a room for the exclusive use of its members. The charges incurred or expended by these organizations or its members availing themselves of the facilities of the Pavillion Room form the basis of the cabaret tax assessment here in dispute. It is the Government's contention that the opportunity to witness the floor show in the Main Room was a strong inducement to these organizations to make their arrangements with Ciro's and that indeed, at the appropriate time the movable partition separating the Main Room and the Pavillion Room was opened so as to permit the

Pavillion Room guests to view the floor show in the Main Room. It follows, the Government argues, that such guests were entitled to be present during the furnishing of a public performance for [102] profit within the meaning of Int. Rev. Code of 1954, Section 4231(6),<sup>2</sup> and that the receipts obtained in the Pavillion Room both before and after the separation was removed are subject to the cabaret tax. More specifically, the Government is here seeking to sustain a cabaret tax on 94% of the receipts attributed to 304 private parties conducted in the Pavillion Room. The 6% of the receipts excluded from the tax represent expenditures by patrons who are presumed to have left prior [103] to seeing the

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<sup>2</sup>Section 4231(6) imposes "a tax equivalent to 20 per cent of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The tax imposed under this paragraph shall be returned and paid by the person receiving such payments \* \* \*"

The term roof garden, cabaret or other similar places is defined by Int. Rev. Code of 1954, Section 4232, to "include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise \* \* \*"

Though the operative sections of the Code have been changed during the five-year period for which the tax is assessed, I have referred only to the sections of the 1954 Code since they substantially embody the provisions which are applicable to each period included in the assessment.

show.<sup>3</sup> While there is some variation in the way these 304 parties were conducted, for the most part private organizations would contact Ciro's for the purpose of arranging for the use of the Pavillion Room on a particular night for the exclusive use of its members. A contract would be negotiated and a deposit secured. Generally dinner would be served commencing some time around 7:00 p.m. and terminating before 10:30 p.m. During this period the movable partition separating the Main Room from the Pavillion Room would remain closed and the parties had the complete and uninterrupted privacy of the Pavillion Room to do as they pleased. Depending on the nature of the organization, speeches, awards, community singing, local entertainment or dancing to music either piped in from the Main Room or furnished by their own hired orchestra might follow the dinner. In any event, at approximately 10:30 p.m. [104] the separation was usually removed so as to enable the groups to view the floor show in the Main Room. There seems to be no question but that the patrons attending the dinner in

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<sup>3</sup>Such charges are exempt from the tax under U. S. Treas. Reg. 43, Section 101.13 (b) (1941), which exempts from the tax charges incurred by patrons who do not remain for any part of the performance.

The use of the 94% figure in computing the tax is admittedly an estimate but in view of plaintiff's failure to keep records as provided by law the Government takes the position that it can reasonably carry over and apply the same percentage of those receipts which are non-taxable in the Main Room to the Pavillion Room operation.



the Pavillion Room expected to be able to see the entertainment in the Main Room, it being the understanding, whether committed to writing or not, that the so-called private parties would be afforded this privilege. Upon conclusion of the floor show, the evidence indicates that most of the guests at the private parties left the premises.

It is under these circumstances that I am called upon to construe the meaning of Section 4231(6) which imposes a tax on amounts paid for refreshment or service at a cabaret:

“\* \* \* furnishing a public performance for profit by or for any person or guest who is entitled to be present during any portion of such performance \* \* \*”

The statute is not free from ambiguity and must be construed so as not to produce illogical or irrational results. A literal translation of the above provision would ascribe to Congressional intent a most arbitrary and unreasonable basis on which the tax is imposed. Such a literal reading of the statute would subject an establishment which operates as a cabaret in the evening to a tax on its late afternoon receipts since it is conceivable that these afternoon patrons might presumably be entitled to view a portion of the evening entertainment if they were to remain on the premises until [105] show time. To condition a tax on such a tenuous showing that the patrons might if they were to wait long enough view the entertainment does not accord with any meaningful or purposeful distinction that we must impute to

Congress. As noted by the Supreme Court, "taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences." *Farmers Loan Co. v. Minnesota*, 280 U. S. 204, 212 (1930). See also *Paxson v. Commissioner*, 144 F. 2d 772, 776 (C.C.A. 3, 1944). In connection with the present statute the Internal Revenue Bureau itself, through the issuance of interpretive regulations and rulings, has impliedly recognized the necessity, or at least the desirability, of limiting the broad language of the statute.<sup>4</sup>

The Internal Revenue Bureau has taken the position, however, that payments for food, refreshment, service or merchandise made prior to the beginning of the entertainment in a cabaret, roof garden or other similar place by patrons who are entitled to view a public performance are subject to the cabaret tax where the patrons by or for whom such amounts are paid do in fact remain for any [106] portion of the performance. Rev. Rul. 54-487, 1954-2 Cum. Bull. 376. Though limiting somewhat the broad scope and effect which flows from a literal reading of the statute,<sup>5</sup> the revenue ruling nevertheless poses

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<sup>4</sup>See U. S. Treas. Reg. 43, Section 101.13 (b) (1941), *supra*, note 3.

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<sup>5</sup> This ruling like the Treasury Regulation cited in note 3, *supra*, precludes taxation of charges incurred by patrons who do not remain for the public performance.

an unrealistic criterion which may in some situations lead to results which under no stretch of the imagination could be considered as within the contemplation of Congress in enacting Section 4231 (6).

The opinion in *La Jolla Casa de Manana v. Riddell*, 106 F. Supp. 132 (S. D. Cal., 1952) aff'd 206 F. 2d 925 (C.A. 9, 1953), is particularly significant inasmuch as it presumably expresses the Ninth Circuit's thinking on the subject. Judge Byrne, by noting that Congress in imposing a cabaret tax, "envisioned an essential unity between the service of refreshment and the enjoyment of the entertainment," adopted an interpretation inconsistent with that placed on the statute by the Revenue Department (106 F. Supp. at 135). Involved in the *Casa de Manana* case was the imposition of the cabaret tax from midnight until 2:00 a.m. after the entertainment had ceased. Though some of the patrons to whom refreshments were sold during these hours had been present during part of the entertainment prior to midnight, the Court refused to [107] allow a cabaret tax assessment on any of the receipts from midnight to 2:00 a.m. A contrary decision, as noted by Judge Byrne, would place a construction on the statute which would exempt post midnight purchases by patrons who were present at the entertainment from 9:15 p.m. until 9:30 p.m. and returned at 12:30 a.m., while taxing such purchases by patrons remaining at the cabaret past 12:00 o'clock p.m. The illogic of such a construction is demonstrated by the fact that the applicability of the tax



on post midnight purchases would be made dependent on whether or not a patron would take a walk at midnight. Though the Casa de Manana case concerned itself with the taxability of receipts subsequent to a public performance its underlying rationale is equally applicable to receipts obtained prior to the commencement of such a performance. Using the same reasoning as was employed by Judge Byrne the taxation of all payments made for refreshments and service by patrons who were present both prior to and during the public performance, where the applicability of the tax to the pre-performance receipts would be otherwise had there been an interval in their attendance, is without reason and logic.

I do not mean to suggest that the Treasury Regulations taxing such receipts should be denied any meaning [108] and effect. Certainly, to allow pre-performance receipts in each and every case to escape the imposition of a tax would serve to provide a facile means for tax avoidance, would compound the already existing difficulties present in tax collection and administration, and would be as much productive of inequities and as lacking in logic as would be the adoption of the other extreme—holding all pre-performance payments by persons remaining for the public performance within the pale of this statute. The only sensible and practical approach to the problem is to consider the wording of the statute in the light of each factual situation as it is presented keeping always in mind the ob-

jectives and purposes the statute sought to achieve. As I construe the statute, whatever be its true scope, it was never intended to cover those pre-performance payments by patrons whose desire to be present at the public performance was incidental to some other more cogent reason for attending the cabaret, such as a gathering of a private club or organization for the conduct of its business. Any other construction would lead to some of the strikingly incongruous results suggested by counsel.

In the instant case the chief factor militating against inclusion of the pre-performance receipts in the tax assessment is that the patrons by or for whom the charges [109] were incurred were seemingly members of a private party, a factor which is relevant in showing that their chief motivation for engaging *Ciro's* was for the purpose of enjoying the intimacy of their own private gathering rather than for purposes of seeing the floor show. In this regard the Government has referred me to U. S. Treas. Reg. 43, Section 101.14 (b) (1941), made applicable to 1954 Code by T. D. 6091, 1954-2 Cum. Bull. 47, which provides that amounts paid for refreshment, service, or merchandise in a room which is entirely separate from the room in which entertainment is furnished, are not subject to tax provided the patrons in such a separate room may not witness the entertainment and any door in the wall or partition separating the two rooms remains closed during the period of entertainment except when persons pass from one room to another. For

similar judicial constructions of the statute see *In re Duffin*, 141 F. Supp. 869 (S. D. Cal., 1956); *McKenzie v. Maloney*, 71 F. Supp. 691 (D. Ore., 1946). The Government argues that since the partition was removed at 10:30 p.m. and the Pavillion Room patrons were able to view the entertainment the case does not fall within the exception set out by the regulations and the tax assessment here in issue was entirely proper.

The error of the Government's reasoning [110] lies in its failure to distinguish two separate concepts. The taxing statute requires that there be both (1) a public performance and (2) the patrons be entitled to view any portion of such a performance, as a condition for the imposition of the cabaret tax. The regulation above upon which the Government places such strong reliance goes solely to the question of whether there is a public performance. As a related issue, though nevertheless separate and distinct, is the question of whether or not the patrons of the Pavillion Room were entitled to be present during any of this performance. As noted earlier, "entitled to be present" cannot be construed literally and must be read in the light of the circumstances of each individual case. Even assuming *arguendo* that in view of the removal of the partition at or about 10:30 p.m. there was a public performance in regard to the Pavillion Room guests it is not determinative of whether such guests were entitled to be present under the meaning which I have ascribed to such words. The fact that the

Pavillion Room parties may have been public when viewed in their entirety is immaterial insofar as it pertains to the pre-performance receipts if it be shown that the main purpose of private groups in engaging the Pavillion Room was other than to be present at the entertainment. To conclude as does the [111] Government that a showing that plaintiff has failed to place himself within the exception of Section 101.14(b) of Regulation 43 is dispositive of the entire issue raised by the tax on the Pavillion Room receipts is susceptible to the same objections raised by Judge Byrne in the *Casa de Manana* case. Under such a criterion, a day-long convention if held in the Pavillion Room would have its entire payments for services and refreshments subjected to the tax if at 10:30 p.m. the separation was removed for the conventioners to view for an hour or so the entertainment in common with the public patrons enjoying the facilities of the Main Room; or, perhaps to better illustrate the unsoundness of this position, the Government seeks to sustain the tax imposed, though under the applicable regulations it must concede that if the Pavillion Room parties had been truly private prior to 10:30 p.m. and had the guests thereupon disbanded only to return individually to the Main Room, undistinguished from the other patrons to view the floor show, the charges incurred in the Pavillion Room would not be taxable.

It follows that in the instant case a determination of whether the parties when viewed in their entirety



are public or private cannot be conclusive of the ultimate issue presented. Rather, the applicability of the tax is to be [112] tested by the motivation formulation which I have previously described. In order to determine how significant a factor the privilege of viewing the floor show played in the decision of the 304 organizations to reserve the Pavillion Room, evidence of the operations and physical facilities of both rooms are relevant. Certainly, if the operations and physical layouts of both rooms were such as to give the impression of oneness, the inference is justified that the organizations using the Pavillion Room desired to simulate as much as possible the conditions in the Main Room, considered themselves part and parcel of the general Ciro's operation, and not so much for reasons of privacy but for purposes of capturing Ciro's atmosphere, floor show and all, engaged the facilities of the Pavillion Room.

There seems to be no real dispute that the 304 parties in dispute were private up to 10.30 p.m. The Government concedes that if the parties had ended before the commencement of the floor show or if the partition had remained closed and the Pavillion Room patrons excluded from entering the Main Room or observing the activity therein the expenditures before 10:30 p.m. would not lie within the scope of the tax. This would be true, even if the groups using the Pavillion Room had arranged for their own entertainment since under the statute there would be no public performance. [113]

The crucial determination then, as I see it, is whether the operation of these so-called private parties is so intimately related to the general operation of the Main Room, and the viewing by the Pavillion Room guests of the entertainment at 10:30 p.m. such an integral part of their evening's activities, that it can be reasonably inferred that the compelling motive in reserving the use of the Pavillion Room was for purposes of seeing *Ciro's* entertainment. On this question much evidence was received at the trial. In addition, in order better to understand and appraise the physical relationship between the two rooms, as I have indicated, the Court itself inspected the premises with all counsel present. On the basis of this personal observation it is my opinion that the floor plan and structural layout of the two rooms compels the finding that two separate and distinct rooms were contemplated by the owner and that it was intended that *Ciro's* would acquire the private party business by offering the privacy necessary to these organizations in the execution of their customary meetings or gatherings while affording them the opportunity of functioning in a well-known establishment like *Ciro's*.

The two rooms are separated by a lounge [114] with separate seating and dining facilities. The lounge is slightly elevated and the Pavillion Room is further raised, thereby creating a six step elevation differential between the Pavillion Room and the Main Room. Because of this added height the patrons sitting in the Pavillion Room can view the

entertainment in the Main Room when the separation wall and curtain are withdrawn by looking through the adjacent lounge. However, since the stage is located at the other end of the Main Room, obtaining a good perspective of the floor show from the Pavillion Room is difficult in view of the distance involved, and those in the rear of the Pavillion Room must move their seats into the fore part of that room in order to view the show. Though ingress and egress to both rooms is possible by way of the lounge, the Pavillion Room has in addition its own separate entrance. Rest Rooms are shared in common with the Main Room, though entrance can be made from the Pavillion Room itself. Each room has its separate dance floor and band stand. Tables and chairs used in the respective rooms seem to be of a different character and their arrangement dissimilar. The building plans further disclose that the two rooms were not constructed as one unit but that the Pavillion Room was added long after the Main Room had been in existence. I [115] might further add that upon the closing of the partition separating the two rooms there is an atmosphere of complete privacy and it is reasonable to assume that it was this privacy together with the facilities available at *Ciro's* which the organizations found so attractive.

A comparison of the respective operations of both rooms further discloses an intent on the part of the management to treat the rooms other than as a single unit. The plaintiff has testified as to some 25 basic differences in the operations of the two rooms. To

mention but a few such distinctions—there were differences in menus, prices, services, working hours and duties of the waiters, manner of payment, parking fees, cover charges, etc. Under such circumstances I find that the private groups availing themselves of the facilities of the Pavillion Room did not consider themselves as part of the public patronage at *Ciro's* and that any intent on their part of being assimilated into the general overall cabaret atmosphere of *Ciro's* was of incidental significance in their decision to conduct their parties in the Pavillion Room.<sup>6</sup> Their conscious choice to reserve the Pavillion Room which was located at considerable distance from the main sphere of activity indicates to me that the prime moving consideration in selecting the Pavillion Room was the desire to achieve some sense of privacy for their group activity and business—at least until the entertainment began. In view of this conclusion the receipts prior to the removal of the separation in the Pavillion Room and the commencement of the floor show are outside the scope of the cabaret tax and were improperly included within the assessment.

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<sup>6</sup>I am not unmindful that one of the inducements for arranging such gatherings at *Ciro's* was the opportunity to view the floor show. But it seems reasonable to me that if such were the principal factor in selecting *Ciro's* the private groups would have done infinitely better to reserve so many tables in the main entertainment room to accommodate their party. As such they would not only have a much better vantage point from which to see the show but they would be able to use the large dance floor located in the Main Room with less inconvenience.



Plaintiff next contends that if the parties be found to be private prior to 10:30 p.m. such a characterization should not be destroyed upon the removal [117] of the partition, and that all receipts whether obtained prior to or subsequent to the entertainment should be excluded from the tax. Since the evidence is undisputed that upon the removal of the partition the Pavillion Room guests did observe and participate in the public performance in common with the other patrons in the Main Room I fail to see why any distinction between the two rooms is warranted during this period. I might analogize the position of the Pavillion Room guests to the patrons of the lounge during the show or to the late-comers to the Main Room, who because of the crowded conditions existent there, are forced to stand at the bar in the lounge in order to see the floor show. Any payments for drinks or refreshments made by these patrons would, of course, be subject to the tax.

The parties have stipulated that with respect to the \$55,581.98 assessed against the Pavillion Room receipts, \$5,200.63 would represent the tax on payments made subsequent to 10:30 p.m. I find therefore that \$5,200.63 represents the correct tax assessment on the Pavillion Room operation. [118]

### Ciroette Room

The Giroette Room like the Pavillion Room was used primarily to accommodate private gatherings. However, unlike the Pavillion Room, it was located on the second floor of the building and those patrons desiring to see the floor show could do so only by

descending a flight of stairs and passing through two doorways to the Main Room. Contending that plaintiff held out to the prospective organizations desiring to use the Ciroette Room the promise of seeing the entertainment at 10:30 p.m. and that some 5% of the Ciroette patrons did in fact avail themselves of this opportunity the Government assessed a cabaret tax based on 5% of the receipts taken in by the Ciroette Room. Plaintiff concedes that if any tax is due it is to be computed on the basis of 5% of these receipts and the only question presented for my consideration is whether as a matter of law the cabaret tax applies to this 5%.

The nature of these private parties being similar to those conducted in the Pavillion Room my prior discussion on this subject is pertinent here and does not have to be repeated. However, the reasons for denying the tax on pre-performance receipts in the Pavillion Room are even more potent here in view of the obvious remoteness of the Ciroette Room and the substantial effort and distance [119] to be traversed for its patrons to observe the floor show. I find therefore, that the tax assessment on the 5% of the Ciroette Room's receipts is improper.

### Closed House Parties

Part of the initial deficiency assessment consists of a 20% tax on all amounts paid for admission, refreshment, service or merchandise on twenty evenings when all the facilities of Ciro's were reserved by and for the members of one particular organization. The Government seeks to sustain the imposi-

tion of the tax on the basis of a recent ruling which reads as follows:

“Where a private organization arranges to hold an affair in a room at a hotel which normally is operated as a cabaret and the affair is held under such circumstances that the hotel furnishes practically the same services, including entertainment, during the same hours that the room is operated as a cabaret, the arrangements made by the private organization are regarded as a mere reservation of tables. In such case, the Bureau holds that the room is operated as a cabaret on such occasions, even though the patronage is limited to the members, together with the guests of the private organization, and the private organization furnishes entertainment in addition to that furnished by the hotel \* \* \*

Where a private organization holds a dinner in a room at a hotel, under such circumstances that the hotel does not furnish any entertainment but the private organization does provide dancing facilities for the persons [120] attending by hiring an orchestra, or furnishes other entertainment, cabaret tax does not apply to any amount paid in connection with the affair.” Special Ruling, August 31, 1949, 5 CCH 1950 Stand. Fed. Tax Rep. Para. 6053.

Under this ruling the issue to be resolved is whether the same services and entertainment were provided or whether the private organizations themselves contracted for the entertainment. The ruling by the Commissioner has never been passed on by a Court and plaintiff contends that it is contrary to

those cases which determine the applicability of the tax on the basis of whether the parties are public or private. See *United States vs. Lambeth*, 176 F. 2d 810 (C.A. 9, 1949); *Naylor vs. United States*, 102 F. Supp 309 (S.D. Cal. 1952). Under plaintiff's interpretation of the law the taxability of the receipts in question hinges on a determination of whether the public was in fact excluded from these parties.

The respective litigants are therefore in hopeless conflict on the applicable criteria to be applied. However, I need not resolve this conflict in order to dispose of the immediate issue before me. Even assuming the correctness of the Government's position, it cannot prevail since the evidence conclusively establishes that the private [121] organizations themselves contracted for the entertainment and music. I attach little significance to the fact that the show usually provided was the same as that regularly staged by *Ciro's* and that *Ciro's* advised the private organizations as to the amount and distribution of the payments to be made to the performers if the private organizations should hire them. It appears, that at best, *Ciro's* was acting as an intermediary for the convenience of the private groups. The evidence is unmistakably clear that in all cases payments were made directly by the private groups to the performers and private groups could if they so desired rent the Main Room without the *Ciro* entertainment and could furnish instead their own entertainment and orchestra. Indeed when the *Ciro* entertainers were retained by the private groups they

were able to exercise control over the time when the performers would commence, the type of performance, etc., indicating it was a closed private group performance. As such, any service rendered by Ciro's was purely advisory and for the convenience of the private group and does not justify a finding that Ciro's furnished the entertainment on these twenty evenings in issue. The private organizations remained free to reject the regular entertainment appearing at Ciro's and if they chose to engage such performers could modify their [122] acts to suit their own purposes.

The Government's contention that on six of the twenty nights in question the public was admitted and as to at least these six occasions all the receipts should be taxable equally, is without merit. It appears that the public was admitted only after the private groups had concluded their parties and surrendered the premises. The subsequent reversion of the Club to a cabaret status can certainly have no bearing on the nature or the character of the parties in which the public was rigidly excluded.

I find that the assessment on the twenty closed house parties is improper. Submit judgment consistent with this opinion.

Dated: January 3, 1958.

/s/ IRVING R. KAUFMAN,

United States District Judge.

[Endorsed]: Filed January 3, 1958. [123]



[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Defendant, United States of America, through its counsel of record, moves the Court for an order vacating and setting aside the judgment dated, filed and entered January 3, 1958, and for a new and further trial, or for a judgment in favor of the defendant as prayed for in the defendant's answer and counterclaim, upon the following grounds:

(1) The conclusions of law and judgment entered therein are contrary to and inconsistent with the findings of fact found by the Court to be true.

(2) Error in law occurring at the trial in entering judgment in favor of the plaintiff on all issues except the sale of drinks in the Pavillion Room after 10:30 p.m., instead of in entering judgment for defendant upon the findings of fact which were found to be true by the Court. [124]

(3) Insufficiency of the evidence to justify the following findings:

(a) Upon conclusion of the floor show, most of the guests at the private parties of the Pavillion Room left the building.

(b) The patrons by or for whom the charges in the Pavillion and Ciroette Rooms were incurred were seemingly members of private parties.

(c) The 304 parties in dispute with respect to the Pavillion Room were private up to 10:30 p.m.

(d) The operation of these so-called private parties is not so intimately related to the general operation of the Main Room, and the viewing by the Pavillion Room guests of the entertainment at 10:30 p.m. such an integral part of their evening's activities, that it can be reasonably inferred that the compelling motive in reserving the use of the Pavillion Room was for the purposes of seeing Ciro's entertainment.

(e) That the private groups availing themselves of the facilities of the Pavillion Room did not consider themselves as part of the public patronage of Ciro's and any intent on their part of being assimilated into the general overall cabaret atmosphere of Ciro's was of incidental significance in their decision to conduct their parties in the Pavillion Room.

(f) The receipts prior to the removal of the separation in the Pavillion Room and the commencement of the floor show are outside the scope of the cabaret tax and were improperly included within the assessment.

(g) That \$5,200.63 represents the correct tax assessment on the Pavillion Room operation.

(h) That the amount of drinks served after 10:30 p.m. rather than the payments received for food, refreshment and merchandise, whenever sold, represents the correct measure of [125] cabaret tax liability.

(i) That the tax assessment on 5% of the Ciroette Room receipts is improper.



(j) With respect to the Closed House parties the entertainment was furnished by the private groups rather than by Ciro's.

(k) That Ciro's did not furnish the entertainment on the 20 evenings in issue.

(l) That on 6 of the 20 nights in question the private groups had concluded their parties and surrendered the premises before the general public was admitted.

(4) With respect to the various issues, the Court failed to find based on the weight of the evidence that the payments made by the patrons of the Pavillion Room and 5% of the patrons of the Ciroette Room entitled them to be present at public performances for profit and thus subjected to the tax their payments for food, refreshment and merchandise during the evidence they were at Ciro's.

(5) Error in law occurring at the trial and insufficiency of the evidence to justify the finding that the showing that plaintiff has failed to place himself within the exception of Section 101.14(b) of Regulation 43 is not dispositive of the entire issue raised by the tax upon the Pavillion Room receipts.

The motion will be made and based upon the following papers:

- (a) The Complaint.
- (b) Amended answer and counterclaim.
- (c) Defendant's memorandum of law.

- (d) Defendant's pre-trial opening statement.
- (e) Reply to counterclaim. [126]
- (f) Stipulation of Facts.
- (g) Stipulation re the cumulative effect of the testimony of Pavillion Room witnesses.
- (h) Brief of the United States.
- (i) Court's decision filed January 3, 1958.
- (j) All exhibits.
- (k) Reporter's transcript of the testimony.

With respect to ground 3 of the motion and its subdivisions, the great preponderance of the evidence of the many and various witnesses who are unbiased and credible in every regard was contrary to the facts found. The plaintiff's testimony is entitled to little weight and credence because of his bias and obvious interest in the outcome of the suit and of his failure to recall the details of any particular banquet party, and for the further reason of his failure to call any other or supporting witnesses with respect to the matters to which he testified.

Respectfully submitted,

LAUGHLIN E. WATERS,  
United States Attorney;

EDWARD R. McHALE,  
Assistant United States At-  
torney, Chief, Tax Division,

/s/ EDWARD R. McHALE,  
Attorneys for Defendant. [127]

Memorandum in Support of Motion for  
New Trial

A new trial may be granted on all or part of the issues in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the Court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law, or make any findings and conclusions, and direct the entry of a new judgment.

Fed. R. Civ. P. 59(a).

Fed. R. Civ. P. 59(b).

Local Rules for the Southern District of  
California, Rule 17.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 13, 1958. [128]

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[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND JUDGMENT

The above cause came on regularly for trial on December 19, 1957, before the Honorable Irving R. Kaufman, United States District Judge, presiding, without the intervention of a jury, the plaintiff represented by his attorney, Ernest R. Mortenson,

Esq., the defendant represented by its attorneys, Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division; and after having been continued for further trial from time to time, and evidence received, briefs filed, and oral arguments having been heard, and having on December 26, 1957, been duly submitted, and the Court having duly considered the evidence, briefs and arguments of the parties, and having on January 3, 1958, filed its opinion, now finds as follows:

### Findings of Fact

#### I.

On November 14, 1955, the authorized delegate of the Secretary of the Treasury assessed against Herbert D. Hover, d/b/a [130] *Ciro's*, cabaret taxes for the period June 1, 1951, through March 31, 1955, in the sum of Sixty-seven Thousand Six Hundred Sixty Dollars and Sixty-two Cents (\$67,660.62) taxes and Seven Thousand Eight Hundred Fifty-eight Dollars and Fifty-one Cents (\$7,858.51) interest for a total assessment of Seventy-five Thousand Five Hundred Nineteen Dollars and Thirteen Cents (\$75,519.13). Notice and demand for payment of the said taxes and interest was made upon the plaintiff on November 16, 1955, and he paid the sum of Three Hundred Dollars (\$300.00), and no more, on August 7, 1956, leaving an outstanding balance of said assessment of Seventy-five Thousand Two Hundred Nineteen Dollars and Thirteen Cents

(\$75,219.13), together with interest as provided by law.

## II.

The aforesaid deficiency assessment of cabaret taxes represented additional taxes assessed with respect to three phases of plaintiff's operation for the period involved: The Citroette Room; the Pavilion Room and the "Closed House" parties. Of the total assessment of Sixty-seven Thousand Six Hundred Sixty Dollars and Sixty-two Cents (\$67,660.62), Nine Hundred Ninety-two Dollars (\$992.00) is attributable to "Main Room operations" and is conceded to be due and owing by the plaintiff because of a clerical error and is not in issue in this lawsuit.

## III.

The amounts of the respective deficiencies in tax determined by the Revenue Agents who made the audit, was based on their examination of plaintiff's books and records and applied the cabaret tax to a certain percentage of the receipts of each room on a basis that is more fully detailed hereinafter. The taxpayer did not consider the receipts here in issue of the said rooms taxable and, consequently did not, in his books and records, segregate any portion of the receipts as Federal cabaret taxes. [131]

## IV.

Plaintiff maintained records showing receipts and the computation of the cabaret tax as reported on the tax returns, but plaintiff kept no records showing what, if any, proportion of the persons who at-



tended the parties in the Pavillion Room stayed for the floor show or for dancing.

## V.

Ciro's, located on Sunset Boulevard in Los Angeles, is subdivided into three rooms in which the services and facilities of the Club are offered to the public. In addition to the main entertainment and dining room, herein referred to as the "Main Room," there are the "Pavillion" and "Ciroette" rooms. A lounge or cocktail bar located adjacent to the Main Room also serviced Ciro's patrons but its operations are not involved in this suit. In issue in this proceeding are the taxability of receipts from (1) the Pavillion Room, (2) the Ciroette Room and (3) the "Closed House parties"—when the entire club was closed to the public and reserved for the exclusive use of private organizations.

## VI.

The Pavillion Room is located adjacent to the lounge (which is basically a raised extension of the Main Room) and is separated therefrom by a movable wall and thick, soundproof curtain. This room was used primarily to accommodate private organizations which desired to reserve for the evening such a room for the exclusive use of its members.

## VII.

The Government assessed a cabaret tax on 94% of the receipts attributed to 304 private parties conducted in the Pavillion Room. The 6% of the re-

ceipts excluded from the tax represents amounts paid for food, refreshment or merchandise by or for patrons or guests who are presumed to have left prior to seeing the floor show. [132]

### VIII.

While there is some variation in the way these 304 parties were conducted, for the most part private organizations would contact *Ciro's* for the purpose of arranging for the use of the Pavillion Room on a particular night for the exclusive use of its members. A contract would be negotiated and a deposit secured. Generally dinner would be served commencing some time around 7:00 p.m. and terminating before 10:30 p.m. During this period the movable partition separating the Main Room from the Pavillion Room would remain closed and the parties had the complete and uninterrupted privacy of the Pavillion Room to do as they pleased. Depending on the nature of the organization, speeches, awards, community singing, local entertainment or dancing to music either piped in from the Main Room or furnished by their own hired orchestra might follow the dinner. In any event at approximately 10:30 p.m. the separation was usually removed so as to enable the groups to view the floor show in the Main Room.

### IX.

The patrons attending the dinner in the Pavillion Room expected to be able to see the entertainment in the Main Room, it being the understanding,



whether committed to writing or not, that the so-called private parties would be afforded this privilege. Upon conclusion of the floor show, most of the guests at the private parties left the premises.

### X.

In view of the removal of the partition at or about 10:30 p.m., there was a public performance in regard to the Pavillion Room guests from that time on.

### XI.

The 304 parties in dispute were private up to 10:30 p.m.

### XII.

Ciro's was a famous night club, offering top-notch entertainers [133] for its floor shows, such attractions as Sammy Davis, Jr., Sophie Tucker, Xavier Cugat and his orchestra, and it attracted noted Hollywood personalities as its customers. It offered dancing nightly to two alternating orchestras in the Main Room. Ciro's widely advertised its entertainment.

### XIII.

In its advertising Ciro's offered the facilities of the Ciroette Room and the Pavillion Room to banquet groups with the inducement that the groups could witness the famed Ciro's entertainment.

### XIV.

The operation of the so-called private parties was related to the general operation of the Main Room.

## XV.

The viewing by the Pavillion Room guests of Ciro's entertainment after 10:30 p.m. was an integral part of their evening's activities and was a motive in reserving the use of the Pavillion Room.

## XVI.

The construction of the Pavillion Room was planned and executed by the plaintiff after he had been operating Ciro's for some years, with one of the major features being the expansion of the banquet business by the ability to offer the famed Ciro's entertainment to regular banquet groups without their being obliged to leave the room they dined in and by Ciro's not being obliged to put on an extra performance in a separate room for the banquet groups.

## XVII.

The floor plan and structural layout of the Main Room and the Pavillion Room compels the finding that two separate and distinct rooms were contemplated by Mr. Hover and that it was intended that Ciro's would acquire the private party business by offering the privacy necessary to these organizations in the execution of their [134] customary meetings or gatherings while affording them the opportunity of functioning in a well-known establishment like Ciro's and witnessing the famed entertainment provided for its Main Room customers at the same time and with the same glamorous atmosphere.

## XVIII.

The two rooms are separated by a lounge with separate seating and dining facilities. The lounge is a slightly elevated portion of the Main Room and the Pavillion Room is further raised, thereby creating a six step elevation differential between the Pavillion Room and the Main Room. Because of this added height the patrons sitting in the Pavillion Room can view the entertainment in the Main Room when the separation wall and curtain are withdrawn by looking through the adjacent lounge. Since the stage is located at the other end of the Main Room, obtaining a good perspective of the floor show from all portions of the Pavillion Room is difficult in view of the distance involved, and those in the rear of the Pavillion Room must move their seats into the fore part of that room in order to view the show. Though ingress and egress to both rooms is possible by way of the lounge, the Pavillion Room has in addition its own separate entrance. Rest Rooms are shared in common with the Main Room, though entrance can be made from the Pavillion Room itself. Each room has its separate dance floor and band stand. Tables and chairs used in the respective rooms seem to be of a different character and their arrangement dissimilar. The building plans further disclose that the two rooms were not constructed as one unit but that the Pavillion Room was added long after the Main Room had been in existence. Upon the closing of the partition separating the two rooms there is an atmosphere of complete privacy.

## XIX.

This privacy together with the facilities and entertainment available at Ciro's was found attractive by the organizations. [135]

## XX.

Of the 304 known evenings during the period involved when the Pavillion Room was engaged by banquet groups, on 257 of those occasions the price of drinks sold to the Pavillion Room patrons was raised from 75 cents to 90 cents at show time, an increase of 20 per cent. No part of the price of the drinks sold therein was either reported as cabaret tax, set aside as cabaret tax by the plaintiff, or paid over to the United States as cabaret tax.

## XXI.

It was the general understanding of the groups using the Pavillion Room that the increase in the price of the drinks from 75 cents to 90 cents at show time was caused by the collection of the cabaret tax; indeed, Ciro's encouraged that belief both orally and in writing.

## XXII.

Plaintiff did not maintain any records to show and has not shown the amounts paid for refreshments, service, and merchandise by or for the patrons or guests of the Pavillion Room who either:

(a) Saw and heard the floor show and dancing in the Main Room from the Pavillion Room;

(b) During a portion of the evening went into the main diding room to dance;

(c) During a portion of the evening went into the Main Room to witness or hear a portion of the entertainment; or

(d) Who left *Ciro's* before show time and before the accordion curtain was opened.

### XXIII.

A comparison of the respective operations of both rooms further discloses an intent on the part of the management to treat the rooms other than as a single unit. The plaintiff has testified as to some 25 basic differences in the operations of the two rooms. To mention but a few such distinctions—there were differences in [136] menus, prices, services, working hours and duties of the waiters, manner of payment, parking fees, cover charges, etc.

### XXIV.

The private groups availing themselves of the facilities of the Pavillion Room had an intent on their part of being assimilated into the general overall cabaret atmosphere of *Ciro's*.

### XXV.

Said intent was of incidental significance in their decision to conduct their parties in the Pavillion Room.

### XXVI.

Said groups did not consider themselves as part of the public patronage at *Ciro's*.



## XXVII.

Their conscious choice to reserve the Pavillion Room which was located at considerable distance from the main sphere of activity indicates that the prime moving consideration in selecting the Pavillion Room was the desire to achieve some sense of privacy for their group activity and business—at least until the entertainment began.

## XXVIII.

Upon the removal of the partition at show time, the Pavillion Room guests did observe and participate in the public performance in common with the other patrons in the Main Room and no distinction between the two rooms is warranted during this period. The position of the Pavillion Room guests is analogous to the patrons of the lounge during the show or to the late comers to the Main room, who, because of the crowded conditions existent there, are forced to stand at the bar in the lounge in order to see the floor show. Any payments for drinks or refreshments made by these patrons were, of course, subject to the tax.

## XXIX

Plaintiff has not established the time when payment was [137] actually made by or for the patrons or guests of the Pavillion Room on any of the 304 occasions, for any of the following:

- (a) The food served;
- (b) The drinks served before dinner; or
- (c) The drinks served during dinner.



The plaintiff has established that the drinks served after dinner and after the commencement of show time were paid for at that time, and the cabaret tax applicable thereto was \$5,200.63.

### XXX.

With respect to the \$55,581.98 assessed against the Pavillion Room receipts, \$5,200.63 would represent the tax on food, refreshment or merchandise served to patrons or guests subsequent to 10:30 p.m.

### XXXI.

No admission charge was made to enter the Main Room from either the Ciroette Room or the Pavillion Room.

### XXXII.

The Ciroette Room like the Pavillion Room was used primarily to accommodate private gatherings. However, unlike the Pavillion Room, it was located on the second floor of the building and those patrons desiring to see the floor show could do so only by descending a flight of stairs and passing through two doorways to the Main Room.

### XXXIII.

The plaintiff held out to the prospective organizations desiring to use the Ciroette Room the promise of seeing the entertainment at 10:30 p.m. Some 5% of the Ciroette patrons did in fact avail themselves of this opportunity. The Government assessed a cabaret tax based on 5% of the receipts taken in by the Ciroette Room.

## XXXIV.

Plaintiff concedes that if any tax is due it is to be [138] computed on the basis of 5% of these receipts and the only question presented for consideration is whether as a matter of law the cabaret tax applies to this 5%.

## XXXV.

The nature of these private parties being similar to those conducted in the Pavillion Room, the prior findings on this subject are pertinent here and incorporated by reference. However, the reasons for denying the tax on pre-performance receipts in the Pavillion Room are even more potent here in view of the obvious remoteness of the Ciroette Room and the substantial effort and distance to be traversed for its patrons to observe the floor show.

## XXXVI.

Part of the initial deficiency assessment consists of a 20% tax on all amounts paid for admission, refreshment, service or merchandise on twenty evenings when all the facilities of Ciro's were reserved by and for the members of one particular organization, referred to for convenience as "Closed House" parties.

## XXXVII.

On the "Closed House" occasions, the show and orchestras usually provided were the same as was regularly staged by Ciro's and Ciro's advised the private organizations as to the amount and distribution of the payments to be made to the performers

if the private organizations should hire them. On none of the 20 occasions in issue did the representatives of the private organizations directly deal with the entertainers or their theatrical agents; instead, they dealt through Ciro's personnel, agreeing to pay for the music and entertainment the price Ciro's personnel fixed. In addition to the 20 occasions in issue, during the period involved in this lawsuit there were some 14 other occasions in which private organizations held "Closed House" parties at Ciro's in which representatives of the organization either negotiated directly with Ciro's entertainers or other entertainers, which occasions the defendant did not treat as [139] taxable.

### XXXVIII.

In all cases checks in payment were made payable by the private groups to the performers. Private groups could if they so desired rent the Main Room without the Ciro entertainment and could furnish instead their own entertainment and orchestra. On none of the twenty occasions in issue did they do so. Indeed, when the Ciro entertainers were retained by the private groups they were able to exercise control over the time when the performers would commence and the type of performance. Any service rendered by Ciro's was purely advisory and for the convenience of the private group.

### XXXIX.

Ciro's did not furnish the entertainment on these

twenty evenings in issue. The private organizations remained free to reject the regular entertainment appearing at *Ciro's* and if they chose to engage such performers, could modify their acts to suit their own purposes. In none of the twenty instances in issue did they reject the regular entertainment.

## XL.

Although on 6 of the 20 nights in question, the public was admitted, the public was admitted only after the private groups had concluded their private parties and surrendered the premises. The public then witnessed the same entertainment that had been paid for by checks of the private organizations to the management of *Ciro's* and enjoyed the same entertainment, which in each of the six instances in issue was the same entertainment regularly provided by *Ciro's* during the period involved.

## Conclusions of Law

And from these facts the Court concludes as follows:

### I.

The statute imposing the cabaret tax is not intended to cover those pre-performance parties by those patrons whose desire to [140] be present at the public performance was incidental to some more cogent reason for attending the cabaret performance, such as a gathering of a private group or organization for the conduct of its business.

## II.

The words "entitled to be present" in the statute do not apply to the Pavillion Room parties where the main purpose of the parties engaging the Pavillion Room was other than to be present at the entertainment.

## III.

The criteria of taxability is not whether the amounts paid by or for patrons of the Pavillion Room for food, refreshment and merchandise entitled them to be present during a portion of a public performance for profit or whether the parties when viewed in their entirety are public or private but whether the motive of the private groups engaging the private room was other than to be present at the entertainment.

## IV.

If the parties had ended before the commencement of the floor show or if the partition had remained closed and the Pavillion Room patrons excluded from entering the Main Room or observing the entertainment therein, the expenditures before 10:30 p.m. would not lie within the scope of the tax, even if the group using the Pavillion Room had arranged for their own entertainment, since under the statute there would be no public performance.

## V.

Although the plaintiff kept no records showing the amount paid after 10:30 p.m. for food, refreshments



or merchandise by or for patrons or guests of the Pavillion Room, it is clear from the evidence presented that the serving of food was completed before the beginning of the floor show. Further, it has been stipulated as to the proportion of the beverages served before and after show [141] time. It is also clear that the bar receipts were paid in cash at the time of service. The \$5,200.63 representing the tax on drinks served after 10:30 p.m., is equivalent to the tax on the amounts paid for food, refreshment, and merchandise by or for patrons or guests of the Pavillion Room entitled to be present during such performance for profit and is the correct amount of tax on the Pavillion Room operation. From these facts the Court concludes that of the amount assessed against the plaintiff with respect to the Pavillion Room, the amount representing the service of drinks after 10:30 p.m., in the sum of \$5,200.63, is the proper tax on amounts paid by or for patrons or guests of the Pavillion Room for food, refreshment or merchandise after 10:30 p.m.

## VI.

The tax assessment on 5% of the Ciroette Room's receipts is improper.

## VII.

The private organizations themselves contracted for the entertainment and music supplied to the "Closed House" parties. At best, Ciro's was acting as an intermediary for the convenience of the pri-



vate groups in making the arrangements for the entertainment and music furnished.

### VIII.

After the private groups had concluded their parties and surrendered the premises, the club subsequently reverted to a cabaret status and this has no bearing on the nature of the parties from which the public was rigidly excluded.

### IX.

With respect to the "Closed House" parties, the payments received by *Ciro's* did not entitle the patrons or guests to be present during public performances for profit.

### X.

Defendant is entitled to judgment on its counterclaim for [142] the tax on the amounts paid for refreshment in the Pavillion Room after 10:30 p.m. and for its costs.

### Judgment

In accordance with the foregoing findings of fact and conclusions of law, It is Ordered, Adjudged and Decreed:

(1) That plaintiff take nothing by his complaint for refund of \$300.00, and that it be dismissed with prejudice;

(2) That defendant have judgment against plaintiff on its counterclaim for the sum of

\$....., together with interest on this judgment until paid according to law and for its costs to be taxed by the Clerk of the Court in the sum of \$.....

Dated: This .... day of February, 1958.

.....,

United States District Judge.

Receipt of copy acknowledged.

Lodged: February 14, 1958. [143]

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[Title of District Court and Cause.]

## MEMORANDUM FOR COMPUTATION OF JUDGMENT

[Local Rule 7(h)]

Pursuant to Local Rule 7(h), defendant files this memorandum of amount to be inserted in the judgment. If the judgment is signed on February 25, 1958, the amount that should be entered in the space provided in line 9, page 14 of the Judgment, is \$7,463.86. Interest accrues at the rate of \$1.09 per day from February 25, 1958, and appropriate additions should be made to said amount to be inserted in said space in the event the Court signs the judgment after February 25, 1958.

The amount due was computed as follows: [144]

## Computation of Tax

Tax due defendant pursuant to Findings ¶¶ XXIX and XXX, and Conclusion ¶ V .....	\$5,200.63
Tax due concededly defendant—clerical error, Finding ¶ II .....	992.00
Total tax due defendant .....	\$6,192.63
Less: Payment of Aug. 7, 1956, Finding ¶ I .....	300.00
Net tax due defendant .....	\$5,892.63

## Computation of Interest

(1) Proper assessed interest per decision: On \$6,192.63, from respective due dates of deficiencies to assessment date of 11/15/55 .....	\$ 662.70
(2) Interest from 11/15/55 to 8/7/56 On all tax .....	\$6,192.63
On interest assessed against taxes arising under 1939 Code* .....	647.12
	\$6,839.75
(3) Interest from 8/7/56 to 2/25/58 On net tax and assessed interest as above (2) .....	299.24
Less—payment of 8/7/56 .....	\$6,839.75
	300.00
	\$6,539.75
Total interest to 2/25/58 .....	609.29
Net tax due (per above) .....	\$1,571.23
	5,892.63
Amount to be inserted in Judgment, page 14 line 9, if signed 2/25/58 .....	\$7,463.86

\*No interest is computed on assessed interest on taxes arising under 1954 Code, § 6601(f)(2), i.e., on \$15.58 interest assessed against \$479.52 tax for first quarter 1955.

Interest at the rate of \$1.09 per day from February 25, 1958, is accruing on \$6,539.75 and is to be added to the foregoing sum depending on the date the judgment is actually signed.

Respectfully submitted,

LAUGHLIN E. WATERS,  
United States Attorney;

EDWARD R. McHALE,  
Assistant United States At-  
torney, Chief, Tax Division,

/s/ EDWARD R. McHALE,  
Attorneys for Defendant,  
United States of America.

Approved as to form, pursuant to Local Rule 7(a).

Dated: February 14, 1958.

/s/ ERNEST R. MORTENSON,  
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 14, 1958. [146]

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[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF  
FACT AND CONCLUSIONS OF LAW

Pursuant to local Rule 7(a), Plaintiff moves the Court to substitute the following paragraphs for

those contained in Defendant's proposed Findings of Fact, Conclusions of Law and Judgment.

1. Omit Findings of Fact No. XV.

Reason: This finding is contained in other paragraphs.

2. Omit Finding of Fact No. XVI.

Reason: The evidence does not justify a finding expressed in these words.

3. Amend Finding of Fact No. XVII to read as follows:

“The floor plan and structural layout of the Main Room and the Pavillion Room compels the finding that two separate and distinct rooms were contemplated by Mr. Hover and that it was intended that Ciro's would acquire the private party business by offering the privacy necessary to these organizations in the execution of [147] their customary meetings or gatherings while affording them the opportunity of functioning in a well-known establishment like Ciro's.”

Reason: The above wording is consistent with the facts stated in the Opinion.

4. Amend Finding of Fact No. XIX to read as follows:

“This privacy together with the facilities available at Ciro's was found attractive by the organizations.”

Reason: The above wording is consistent with the facts stated in the Opinion.

## 5. Omit Finding of Fact No. XX.

Reason: The parties stipulated as to the amount of tax on sales of refreshment, service and merchandise after 10:30 p.m. Since the drinks were increased to 90 cents after 10:30 p.m., the stipulation covers that matter. With respect to the sales of drinks at 75 cents prior to 10:30 p.m., the Court holds that such sales were not taxable.

## 6. Omit Finding of Fact No. XXI.

Reason: The evidence regarding the "general understanding" in this regard was conflicting. The proposed finding would not be justified in the light of all of the evidence.

## 7. Omit Finding of Fact No. XXII.

Reason: The Court has held that the amounts paid after 10:30 p.m. were taxable and the amounts paid before 10:30 p.m. are not taxable. Accordingly, the proposed finding would be entirely irrelevant.

## 8. Amend Finding of Fact No. XXIV to read as follows:

"The private groups availing themselves of the facilities of the Pavillion Room had no intent on their part of being assimilated in the general overall cabaret atmosphere of *Ciro's*."

Reason: The proposed Finding of Fact is consistent with the Court's Opinion (bottom page 16, typewritten copy). [148]



9. Omit Finding of Fact No. XXV.

Reason: See reason for change of previous paragraph.

10. Omit Finding of Fact No. XXIX.

Reason: During the course of the trial it was pointed out that the actual time of payment has no relationship to taxability. Payment is often made days or weeks after the event where the patron has a Diners' Club or regular credit card.

11. Amend Finding of Fact No. XXXIII to read as follows:

“Some 5% of the Ciroette patrons saw the entertainment at 10:30 p.m. The Government assessed a cabaret tax based on 5% of the receipts taken in by the Ciroette Room.”

Reason: In the Opinion (page 19) part of the proposed Finding was given as a contention of the Defendant. The above amendment properly expresses a Finding which is consistent with the Stipulation regarding the 5% figure.

12. Omit Finding of Fact No. XXXVII.

Reason: The first part of this Finding is contrary to the facts contained in the Opinion. With regard to the fourteen other occasions in which private organizations held “closed house” parties, the tax there involved is not in issue in this proceeding.

13. Amend Finding of Fact No. XXXVIII to read as follows:

“In all cases checks in payment were made payable by the private groups to the performers. Private groups could, if they so desired, rent the Main Room without the *Ciro* entertainment and could furnish instead, their own entertainment and orchestra. Indeed, when the *Ciro* entertainers were retained by the private groups they were able to exercise control over the time when the performers would commence and the type of performance. Any service rendered by *Ciro*’s was purely advisory and for the convenience of the private group.”

Reason: The above amendment is consistent with the facts appearing in the Opinion (page 22). Mr. Hover testified [149] that the private groups generally had special entertainment to suit the occasion.

14. Amend Finding of Fact No. XXXIX to read as follows:

“*Ciro*’s did not furnish the entertainment on these twenty evenings in issue. The private organizations remained free to reject the regular entertainment appearing at *Ciro*’s and if they chose to engage such performers, could modify their acts to suit their own purposes.”

Reason: See reason for amendment of previous paragraph.

15. Amend Finding of Fact No. XL to read as follows:

“Although on 6 of the 20 nights in question, the public was admitted, the public was admitted only

after the private groups had concluded their private parties and surrendered the premises.”

Reason: There is no competent evidence to establish what entertainment was given in the 6 instances referred to.

16. Amend Conclusions of Law No. 1 to read as follows:

“The statute imposing the cabaret tax is not intended to cover those pre-performance parties by those patrons whose desire to be present at the public performance was incidental to some more cogent reason for attending the cabaret such as a gathering of a private group or organization for the conduct of its business.”

Reason: The insertion of the word “performance” in the proposed finding distorts the meaning of the words in the Opinion at page 9.

17. Omit Conclusion of Law No. III.

Reason: This paraphrasing does not appear to completely state the conclusion set forth in the Opinion.

Respectfully submitted,

/s/ ERNEST R. MORTENSON,  
Attorney for Plaintiff.

Dated: 19th day of February, 1958.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 20, 1958. [150]

[Title of District Court and Cause.]

DEFENDANT'S REPLY TO THE OBJEC-  
TIONS TO PROPOSED FINDINGS OF  
FACT AND CONCLUSIONS OF LAW

Pursuant to Local Rules 3(d) and 7, defendant files this reply to plaintiff's objections to the proposed findings of fact and conclusions of law. For convenience, the paragraph numbers of this reply correspond to the paragraph numbers of the objections.

1.

Proposed Finding XV. The viewing by the Pavillion Room guests of *Ciro's* entertainment after 10:30 p.m. was an integral part of their evening's activities and was a motive in reserving the use of the Pavillion Room.

Plaintiff does not deny the truth of finding but merely states that it is contained in other paragraphs. He has not stated in what other paragraph said finding is contained. It is submitted that said finding is not stated elsewhere in the findings and is an appropriate finding based upon the evidence in accordance with the Court's Opinion. The particular finding is [152] implicit in the first paragraph of page 14 of the Opinion.

2.

Proposed Finding XVI. The construction of the Pavillion Room was planned and executed by the plaintiff after he had been operating *Ciro's* for

some years, with one of the major features being the expansion of the banquet business by the ability to offer the famed *Ciro's* entertainment to regular banquet groups without their being obliged to leave the room they dined in and by *Ciro's* not being obliged to put on an extra performance in a separate room for the banquet groups.

Plaintiff's only objection to paragraph XVI is that the evidence does not justify "a finding expressed in these words." Plaintiff has not suggested an alternative wording. It is submitted that all of the facts herein contained are true and are fully supported by the evidence. Any disagreement with the form proposed should be accompanied with an alternative wording. In the absence of any such alternative wording, the Court should approve the finding as proposed.

3.

Proposed Finding XVII. The floor plan and structural layout of the Main Room and the Pavilion Room compels the finding that two separate and distinct rooms were contemplated by Mr. Hover and that it was intended that *Ciro's* would acquire the private party business by offering the privacy necessary to these organizations in the execution of their customary meetings or gatherings while affording them the opportunity of functioning in a well-known establishment like *Ciro's* and witnessing the famed entertainment provided for its Main Room customers at the same time and with the same glamorous atmosphere.



Plaintiff makes no objection to the last clause of paragraph XVII, merely stating that the first portion of the paragraph is consistent with the facts stated in the Opinion. [153] Since the plaintiff has not articulated any reasons for the objection to the last phrase, and the evidence fully supports the facts found there, it is suggested that said finding should be approved by the Court.

## 4.

Proposed Finding XIX. This privacy together with the facilities and entertainment available at *Ciro's* was found attractive by the organizations.

Likewise in paragraph XIX, the plaintiff fails to articulate any objection to the words "and entertainment" contained in lines 30 and 31 of page 6. It is submitted that the evidence is quite clear that the entertainment offered at show time was found to be attractive by the organizations. Said finding should be made as offered.

## 5.

Proposed Finding XX. Of the 304 known evenings during the period involved when the Pavillion Room was engaged by banquet groups, on 257 of those occasions the price of drinks sold to the Pavillion Room patrons was raised from 75 cents to 90 cents at show time, an increase of 20 per cent. No part of the price of the drinks sold therein was either reported as cabaret tax, set aside as cabaret tax by the plaintiff, or paid over to the United States as cabaret tax.



Plaintiff objects to finding XX presumably on the grounds that the facts were stipulated. However, the Court should be reminded that said finding supports the Court's determination with respect to the taxability of the receipts after 10:30 p.m. and the defendant is entitled to have such a finding formally made, particularly, when it is fully supported by the evidence.

## 6.

Proposed Finding XXI. It was the general understanding [154] of the groups using the Pavillion Room that the increase in the price of the drinks from 75 cents to 90 cents at show time was caused by the collection of the cabaret tax; indeed, Ciro's encouraged that belief both orally and in writing.

The same reasoning applies with respect to paragraph XXI and its inclusion as applies to paragraph XX heretofore discussed in paragraph 5. Furthermore, it is urged that the preponderance of the evidence fully supports the finding.

## 7.

Proposed Finding XXII. Plaintiff did not maintain any records to show and has not shown the amounts paid for refreshment, service, and merchandise by or for the patrons or guests of the Pavillion Room who either:

(a) Saw and heard the floor show and dancing in the Main Room from the Pavillion Room;

(b) During a portion of the evening went into the main dining room to dance;

(c) During a portion of the evening went into the Main Room to witness or hear a portion of the entertainment; or

(d) Who left *Ciro's* before show time and before the accordion curtain was opened.

The plaintiff does not contend that the facts found in paragraph XXII are not true, only that the finding is "irrelevant." However, since the facts are true and are supported by the evidence and stipulations, the defendant is entitled to such a finding insofar as it has a bearing on the conclusions of law the Court draws from the evidentiary facts, e.g., paragraph V.

8.

Proposed Finding XXIV. The private groups availing themselves of the facilities of the Pavillion Room had an intent on their part of being assimilated into the general over-all cabaret atmosphere of *Ciro's*. [155]

The plaintiff's objection to paragraph XXIV is not well taken. Paragraph XXIV is based upon the Court's Opinion. On page 16 the Court said:

"\* \* \* Under such circumstances I find that the private groups availing themselves of the facilities of the Pavillion Room did not consider themselves as part of the public patronage at *Ciro's* and that any intent on their part of being assimilated into the general over-all cabaret atmosphere of *Ciro's* was of incidental sig-

nificance in their decision to conduct their parties in the Pavillion Room.”

The Court does find in that paragraph in its Opinion that there was an intent on the part of the patrons of being assimilated into the general overall cabaret atmosphere of *Ciro's* and properly, in the following paragraph, the Government proposes in the words of the Court that said intent was of “incidental significance.” Therefore, both paragraphs XXIV and XXV objected to in plaintiff's paragraphs 8 and 9 are based on the words and findings of the Court and the preponderance of the evidence.

9.

Proposed Finding XXV. Said intent was of incidental significance in their decision to conduct their parties in the Pavillion Room.

Finding of Fact XXV is correct and based on the language of the Court. See discussion in preceding paragraph 8.

10.

Proposed Finding XXIX. Plaintiff has not established the time when payment was actually made by or for the patrons or guests of the Pavillion Room on any of the 304 occasions, for any of the following: [156]

- (a) The food served;
- (b) The drinks served before dinner; or
- (c) The drinks served during dinner.

The plaintiff has established that the drinks served after dinner and after the commencement of

show time were paid for at that time, and the cabaret tax applicable thereto was \$5,200.63.

Again, the plaintiff does not dispute the truth of the facts found in paragraph XXIX. The plaintiff seeks the omission of the paragraph only on the ground that the finding is irrelevant. It is suggested that the facts being true, they should be found, and that plaintiff's objection should be not to the appropriateness of the finding of fact but if anything, he instead should suggest an appropriate conclusion of law. In view of paragraph V of the conclusions of law, it is submitted that an appropriate conclusion of law has already been submitted. The second sentence of finding XXIX must be found by the Court or else there is not a sufficient factual basis for the judgment the Court has granted the defendant on its counterclaim.

## 11.

Proposed Finding XXXIII. The plaintiff held out to the prospective organizations desiring to use the Ciroette Room the promise of seeing the entertainment at 10:30 p.m. Some 5% of the Ciroette patrons did in fact avail themselves of this opportunity. The Government assessed a cabaret tax based on 5% of the receipts taken in by the Ciroette Room.

The apparent objection of the plaintiff to Finding XXXIII is that it is not expressed in the narrow terms of the written Stipulation of Facts. However, plaintiff concedes that the Court did use the lan-

guage of paragraph XXXIII in its Opinion, page 19. The facts are clear that the promise of seeing the entertainment at 10:30 p.m. was held out to at least 5% of [157] the Ciroette Room patrons and at least 5% of them did avail themselves of the opportunity. Therefore, the finding is true and should be made. As the Court said on page 19 of its Opinion: "The nature of the private parties being similar to those being conducted in the Pavillion Room and the prior discussion on the subject is pertinent" to the Ciroette Room. Therefore, as in the Opinion, where a reference is made to the discussion of the Pavillion Room and is incorporated later, so in the findings, a similar finding with respect to the Ciroette Room should be made as was done with the Pavillion Room. The essence of the finding relating to the Pavillion Room is found in paragraph IX.

## 12.

Proposed Finding XXXVII. On the "Closed House" occasions, the show and orchestras usually provided were the same as was regularly staged by Ciro's and Ciro's advised the private organizations as to the amount and distribution of the payments to be made to the performers if the private organizations should hire them. On none of the 20 occasions in issue did the representatives of the private organizations directly deal with the entertainers or their theatrical agents; instead, they dealt through Ciro's personnel, agreeing to pay for the music and entertainment the price Ciro's personnel fixed. In addition to the 20 occasions in issue, during the



period involved in this lawsuit there were some 14 other occasions in which private organizations held "Closed House" parties at Ciro's in which representatives of the organization either negotiated directly with Ciro's entertainers or other entertainers, which occasions the defendant did not treat as taxable.

Plaintiff states that "the first part" of Finding XXXVII is contrary to the facts contained in the Opinion. Plaintiff fails to state wherein the facts are contrary. Plaintiff did not state wherein the findings were contrary because [158] they aren't and he cannot. For instance, the first sentence of proposed Finding XXXVII reads as follows: "On the 'Closed House' occasions, the show and orchestras usually provided were the same as was regularly staged by Ciro's and Ciro's advised the private organizations as to the amount and distribution of the payments to be made to the performers if the private organizations should hire them." The Court actually said at Opinion, page 22: "I attach little significance to the fact that the show usually provided was the same as that regularly staged by Ciro's and that Ciro's advised the private organizations as to the amount and distribution of the payments to be made to the performers if the private organizations should hire them." [Emphasis supplied.] Plaintiff cannot, therefore, be heard to object that the first sentence is not a fact. He may have wished to add or suggest a conclusion of law that said fact is not of great significance, but the fact was found by the Court and remains a fact.



The second sentence is based on the evidentiary facts and is not contrary to the Court's discussion on page 22 of the Opinion; it is the finding that supports the conclusions of the Court on page 22: "It appears, that at best, *Ciro's* was acting as an intermediary for the convenience of the private groups." The evidence is clear with respect to the twenty occasions in issue, the representatives of the private organizations did not deal directly with the entertainers or theatrical agents but through *Ciro's* and its personnel.

The final sentence of the proposed finding relates to the fourteen other occasions, in which the Government determined that "Closed House" parties were truly not public performances for profit because they adhered to the criteria set forth in Treasury Rulings. It is submitted that said finding is true, material and relevant to the issues posed by the pleadings. The sentence is based upon the stipulation made in open court with [159] respect to the testimony of Chester Ross, Internal Revenue Agent.

### 13.

Proposed Finding XXXVIII. In all checks in payment were made payable by the private groups to the performers. Private groups could if they so desired rent the Main Room without the *Ciro* entertainment and could furnish instead their own entertainment and orchestra. On none of the twenty occasions in issue did they do so. Indeed, when the *Ciro* entertainers were retained by the private

groups they were able to exercise control over the time when the performers would commence and the type of performance. Any service rendered by Ciro's was purely advisory and for the convenience of the private group.

Plaintiff wishes to omit from paragraph XXXVIII the sentence: "On none of the twenty occasions in issue did they do so." That is, did the private groups rent the Main Room without the Ciro entertainment and furnished instead their own entertainment and orchestra? As support for his denial of the truth of this fact, plaintiff states that he testified "that the private groups generally had special entertainment to suit the occasion." It is submitted that Mr. Hover's testimony should be taken with more than a grain of salt because of his complete lapse of memory with respect to particular occasions. The testimony of the impartial witnesses and the exhibits in evidence clearly show that on the twenty occasions in issue the regular Ciro's entertainment and orchestra were used. This is further reason for the inclusion of the disputed last sentence in paragraph XXXVII based on Mr. Ross' testimony.

The Court will note that no reference has been made to any reporter's transcript. The defendant has been attempting to secure the reporter's transcript ever since the time of the trial. One of the reporters, who took down the first day's testimony, has been in and out of the hospital and has been unable to complete it. [160] It is hoped that the

Court will defer action on any motions for a new trial until we have an opportunity to secure the reporter's transcript, which we hope to have within the next week.

## 14.

Proposed Finding XXXIX. *Ciro's* did not furnish the entertainment on these twenty evenings in issue. The private organizations remained free to reject the regular entertainment appearing at *Ciro's* and if they chose to engage such performers, could modify their acts to suit their own purposes. In none of the twenty instances in issue did they reject the regular entertainment.

In finding XXXIX, the plaintiff likewise objects to the sentence: "In none of the twenty instances in issue did they reject the regular entertainment." The finding is true and material and relevant to the issues presented for the same reasons expressed in our paragraph 13.

## 15.

Proposed Finding XL. Although on 6 of the 20 nights in question, the public was admitted, the public was admitted only after the private groups had concluded their private parties and surrendered the premises. The public then witnessed the same entertainment that had been paid for by checks of the private organizations to the management of *Ciro's* and enjoyed the same entertainment, which in each of the six instances in issue was the same entertainment regularly provided by *Ciro's* during the period involved.

The plaintiff objects to the second sentence of paragraph XL, stating: "There is no competent evidence to establish what entertainment was given in the 6 instances referred to." The record is replete with evidence that on the 20 occasions in issue the same entertainers and orchestras regularly playing at *Ciro's* were booked into *Ciro's* for those evenings. The issue [161] always has been and was throughout the trial only whether this entertainment was furnished by *Ciro's* or by the private organizations. The question has been who provided the entertainment, not that this wasn't the same entertainment as was regularly booked into *Ciro's*. The evidence is clear that the regular entertainment did perform on the twenty nights in question. Likewise, the evidence is clear that *Ciro's* itself did not pay for this entertainment on the six evenings in question but that the payment was made by separate checks made by the organizations. See Finding XXXVIII, above. The evidence is further clear that on the six evenings in question the general public was admitted to *Ciro's* after the private groups had concluded their parties. Of course, entertainment and floor shows were provided on those evenings and there is certainly a reasonable inference that it was the same orchestras and entertainment that had there performed for the private organizations.

## 16.

Proposed Conclusion I. The statute imposing the cabaret tax is not intended to cover those pre-performance parties by those patrons whose desire to

be present at the public performance was incidental to some more cogent reason for attending the cabaret performance, such as a gathering of a private group or organization for the conduct of its business.

The plaintiff objects to the word "performance" after the word "cabaret" in the Conclusion I. Defendant was attempting to clarify the conclusion in terms of the statute [I.R.C. 1939, Sec. 1700 (e) (1)] in that defendant's interpretation was that it was the attendance at the performance in the cabaret that was the critical fact giving rise to taxability, not mere attendance in a cabaret.

17.

Proposed Conclusion III. The criteria of taxability is [162] not whether the amounts paid by or for patrons of the Pavillion Room for food, refreshment and merchandise entitled them to be present during a portion of a public performance for profit or whether the parties when viewed in their entirety are public or private but whether the motive of the private groups engaging the private room was other than to be present at the entertainment.

Plaintiff desires to omit Conclusion III because it "does not appear to completely state the conclusion set forth in the Opinion." The plaintiff fails to submit a proposed conclusion which he believes completely states the conclusion. The particular language of the Opinion is found on page 11, as follows: "Even assuming *arguendo* that in view of



the removal of the partition at or about 10:30 p.m. there was a public performance in regard to the Pavillion Room guests it is not determinative of whether such guests were entitled to be present under the meaning which I have ascribed to such words. The fact that the Pavillion Room parties may have been public when viewed in their entirety is immaterial insofar as it pertains to the pre-performance receipts if it be shown that the main purpose of private groups in engaging the Pavillion Room was other than to be present at the entertainment." It is submitted that Conclusion No. III is a correct paraphrase of the discussion of the Court in such a form that it makes a coherent and concise conclusion of law.

### Conclusion

For the foregoing reasons, it is respectfully submitted that the proposed Findings of Fact, Conclusions of Law and Judgment should be executed as proposed.

Respectfully submitted,

LAUGHLIN E. WATERS,  
United States Atty.;

EDWARD R. McHALE,  
Asst. U. S. Atty., Chief, Tax  
Division;

/s/ EDWARD R. McHALE,  
Attorneys for Defendant.

[Endorsed]: Filed February 21, 1958. [163]



[Title of District Court and Cause.]

MOTION FOR NEW TRIAL, AND MOTION TO  
AMEND AND MAKE ADDITIONAL FIND-  
INGS OF FACT AND CONCLUSIONS OF  
LAW

(Fed. R. Civ. P. §§ 52 & 59)

Defendant, United States of America, through its counsel of record, moves the Court for an order vacating and setting aside the judgment dated February 25, 1958, and filed and entered February 28, 1958, and for a new and further trial, or for judgment in favor of the defendant as prayed for in the defendant's answer and counterclaim, and to amend the findings of fact and conclusions of law and to make new findings and conclusions.

Defendant bases its motion for new trial on the same grounds and the same papers set forth in its motion for new trial heretofore filed on January 13, 1958, with respect to the decision filed and entered January 3, 1958, and incorporates said motion herein by reference as if set forth again in full.

In addition, it is urged that the Court erred in its conclusions of law I, II, III, V, VI, and VII, as being erroneous [165] conclusions and based on insufficient evidence.

Motion to Amend and Make Additional Findings of  
Fact and Conclusions of Law

Defendant has heretofore, on February 14, 1958, lodged with the Clerk proposed findings of fact

and conclusions of law, which the Court has considered and adopted in part and rejected in part. With respect to said findings of fact which have been omitted by the Court from its findings executed February 25, 1958, it is submitted that the findings should be amended to add the following:

Proposed finding XX;  
Proposed finding XXI;  
Proposed finding XXII;  
Proposed finding XIV;  
Proposed finding XV;  
Proposed finding XVI; and

the words "and entertainment" omitted from Proposed finding XIX;

Proposed finding XXIX;

the failure to find all but the first sentence of Proposed finding XXXVII; and

the failure to find the third sentence of Proposed finding XXXVIII, to wit, that on none of the 20 occasions in issue did representatives of private organizations deal directly with the entertainers or their theatrical agents and on none of those occasions did they furnish their own entertainment and orchestra or reject the regular entertainment appearing at Ciro's; and

the last sentence of Proposed finding XL. [166]

The foregoing proposed amendments to the findings of fact are based upon the evidence and are for the reasons set forth in Defendant's Reply to Ob-

jections to Proposed Findings of Fact and Conclusions of Law, filed February 21, 1958, which is incorporated herein by reference.

Respectfully submitted,

LAUGHLIN E. WATERS,  
United States Attorney;

EDWARD R. McHALE,  
Assistant United States At-  
torney, Chief, Tax Division;

/s/ EDWARD R. McHALE,  
Attorneys for Defendant,  
United States of America.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 10, 1958. [167]

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United States District Court for the Southern  
District of California, Central Division  
No. 20853—WM Civil

HERBERT D. HOVER, d/b/a CIRO'S,  
Plaintiff,

vs.

UNITED STATES OF AMERICA,  
Defendant.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND JUDGMENT

The above cause came on regularly for trial on  
December 19, 1957, before the Honorable Irving R.

Kaufman, United States District Judge, presiding, without the intervention of a jury, the plaintiff represented by his attorney, Ernest R. Mortenson, Esq., the defendant represented by its attorneys, Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division; and after having been continued for further [170] trial from time to time, and evidence received, briefs filed, and oral arguments having been heard, and having on December 26, 1957, been duly submitted, and the Court having duly considered the evidence, briefs and arguments of the parties, and having on January 3, 1958, filed its opinion, now finds as follows:

### Findings of Fact

#### I.

On November 14, 1955, the authorized delegate of the Secretary of the Treasury assessed against Herbert D. Hover, d/b/a Ciro's, cabaret taxes for the period June 1, 1951, through March 31, 1955, in the sum of Sixty-seven Thousand Six Hundred Sixty Dollars and Sixty-two cents (\$67,660.62) taxes and Seven Thousand Eight Hundred Fifty-eight Dollars and Fifty-one cents (\$7,858.51) interest, for a total assessment of Seventy-five Thousand Five Hundred Nineteen Dollars and Thirteen cents (\$75,519.13). Notice and demand for payment of the said taxes and interest was made upon the plaintiff on November 16, 1955, and he paid the sum of Three Hundred Dollars (\$300.00), and no more, on Au-

gust 7, 1956, leaving an outstanding balance of said assessment of Seventy-five Thousand Two Hundred Nineteen Dollars and Thirteen cents (\$75,219.13), together with interest as provided by law.

## II.

The aforesaid deficiency assessment of [171] cabaret taxes represented additional taxes assessed with respect to three phases of plaintiff's operation for the period involved: The Citroette Room; the Pavilion Room and the "Closed House" parties. Of the total assessment of Sixty-seven Thousand Six Hundred Sixty Dollars and Sixty-two cents (\$67,660.62), Nine Hundred Ninety-two Dollars (\$992.00) is attributable to "Main Room operations" and is conceded to be due and owing by the plaintiff because of a clerical error and is not in issue in this lawsuit.

## III.

The amounts of the respective deficiencies in tax determined by the Revenue Agents who made the audit, was based on their examination of plaintiff's books and records and applied the cabaret tax to a certain percentage of the receipts of each room on a basis that is more fully detailed hereinafter. The taxpayer did not consider the receipts here in issue of the said rooms taxable and, consequently did not, in his books and records, segregate any portion of the receipts as Federal cabaret taxes.

## IV.

Plaintiff maintained records showing receipts and the computation of the cabaret tax as reported on



the tax returns, but plaintiff kept no records showing what, if any, proportion of the persons who attended the parties in the Pavillion Room stayed for the floor show or for dancing. [172]

## V.

Ciro's, located on Sunset Boulevard in Los Angeles, is subdivided into three rooms in which the services and facilities of the Club are offered to the public. In addition to the main entertainment and dining room, herein referred to as the "Main Room," there are the "Pavillion" and "Ciroette" rooms. A lounge or cocktail bar located adjacent to the Main Room also serviced Ciro's patrons but its operations are not involved in this suit. In issue in this proceeding are the taxability of receipts from (1) the Pavillion Room, (2) the Ciroette Room and (3) the "Closed House parties"—when the entire club was closed to the public and reserved for the exclusive use of private organizations.

## VI.

The Pavillion Room is located adjacent to the lounge (which is basically a raised extension of the Main Room) and is separated therefrom by a movable wall and thick, soundproof curtain. This room was used primarily to accommodate private organizations which desired to reserve for the evening such a room for the exclusive use of its members.

## VII.

The Government assessed a cabaret tax on 94% of the receipts attributed to 304 private parties con-



ducted in the Pavillion Room. The 6% of the receipts excluded from the tax represents amounts paid for food, refreshment or merchandise by or for patrons or guests who are presumed to have left prior to seeing the floor show. [173]

### VIII.

While there is some variation in the way these 304 parties were conducted, for the most part private organizations would contact *Ciro's* for the purpose of arranging for the use of the Pavillion Room on a particular night for the exclusive use of its members. A contract would be negotiated and a deposit secured. Generally dinner would be served commencing some time around 7:00 p.m. and terminating before 10:30 p.m. During this period the movable partition separating the Main Room from the Pavillion Room would remain closed and the parties had the complete and uninterrupted privacy of the Pavillion Room to do as they pleased. Depending on the nature of the organization, speeches, awards, community singing, local entertainment or dancing to music either piped in from the Main Room or furnished by their own hired orchestra might follow the dinner. In any event at approximately 10:30 p.m. the separation was usually removed so as to enable the groups to view the floor show in the Main Room.

### IX.

The patrons attending the dinner in the Pavillion Room expected to be able to see the entertainment

in the Main Room, it being the understanding, whether committed to writing or not, that the so-called private parties would be afforded this privilege. Upon conclusion of the floor show, most of the guests at the private parties left the [174] premises.

#### X.

In view of the removal of the partition at or about 10:30 p.m., there was a public performance in regard to the Pavillion Room guests from that time on.

#### XI.

The 304 parties in dispute were private up to 10:30 p.m.

#### XII.

Ciro's was a famous night club which widely advertised its entertainment.

#### XIII.

In its advertising Ciro's offered the facilities of the Ciroette Room and the Pavillion Room to banquet groups. One of the several inducements for arranging such gatherings in these rooms was the opportunity to view the floor show.

#### XIV.

The floor plan and structural layout of the Main Room and the Pavillion Room compels the finding that two separate and distinct rooms were contemplated by Mr. Hover and that it was intended that Ciro's would acquire the private party business by offering the privacy necessary to these organiza-

tions in the execution of their customary meetings or gatherings while affording them the opportunity of functioning in a well-known establishment like *Ciro's*. [175]

## XV.

The two rooms are separated by a lounge with separate seating and dining facilities. The lounge is a slightly elevated portion of the Main Room and the Pavillion Room is further raised, thereby creating a six-step elevation differential between the Pavillion Room and the Main Room. Because of this added height the patrons sitting in the Pavillion Room can view the entertainment in the Main Room when the separation wall and curtain are withdrawn by looking through the adjacent lounge. Since the stage is located at the other end of the Main Room, obtaining a good perspective of the floor show from all portions of the Pavillion Room is difficult in view of the distance involved, and those in the rear of the Pavillion Room must move their seats into the fore part of that room in order to view the show. Though ingress and egress to both rooms is possible by way of the lounge, the Pavillion Room has in addition its own separate entrance. Rest Rooms are shared in common with the Main Room, though entrance can be made from the Pavillion Room itself. Each room has its separate dance floor and band stand. Tables and chairs used in the respective rooms seem to be of a different character and their arrangement dissimilar. The building plans further disclose that the two rooms were not constructed as one unit but that the Pavil-

lion Room was added long after the Main Room had been in existence. Upon the closing of [176] the partition separating the two rooms there is an atmosphere in the Pavillion Room of complete privacy.

#### XVI.

This privacy together with the facilities available at *Ciro's* was found attractive by the private organizations.

#### XVII.

A comparison of the respective operations of both rooms further discloses an intent on the part of the management to treat the rooms other than as a single unit. There are some 25 basic differences in the operations of the two rooms. To mention but a few such distinctions—there were differences in menus, prices, services, working hours and duties of the waiters, manner of payment, parking fees, cover charges, etc.

#### XVIII.

It is clear from the evidence presented that the serving of food in the Pavillion Room was completed before the beginning of the floor show.

#### XIX.

Any intent by the private organizations of being assimilated into the general over-all cabaret atmosphere of *Ciro's* was of incidental significance in their decision to conduct their parties in the Pavillion Room.

## XX.

Said groups did not consider themselves as part of the public patronage at *Ciro's*. [177]

## XXI.

Their conscious choice to reserve the Pavillion Room which was located at considerable distance from the main sphere of activity indicates that the prime moving consideration in selecting the Pavillion Room was the desire to achieve some sense of privacy for their group activity and business—at least until the entertainment began.

## XXII.

Upon the removal of the partition at show time, the Pavillion Room guests did observe and participate in the public performance in common with the other patrons in the Main Room and no distinction between the two rooms is warranted during this period. The position of the Pavillion Room guests during this period is analogous to the patrons of the lounge during the show or to the late-comers to the Main Room, who because of the crowded conditions existent there, are forced to stand at the bar in the lounge in order to see the floor show. Any payments from drinks or refreshments made by these patrons were, of course, subject to the tax.

## XXIII.

With respect to the \$55,581.98 assessed against the Pavillion Room receipts, the parties have stipu-



lated that \$5,200.63 would represent the tax on food, refreshment or merchandise served to patrons or guests subsequent to 10:30 p.m. [178]

#### XXIV.

No admission charge was made to enter the Main Room from either the Ciroette Room or the Pavillion Room.

#### XXV.

The Ciroette Room like the Pavillion Room was used primarily to accommodate private gatherings. However, unlike the Pavillion Room, it was located on the second floor of the building and those patrons desiring to see the floor show could do so only by descending a flight of stairs and passing through two doorways to the Main Room.

#### XXVI.

The plaintiff permitted members of private organizations using the Ciroette Room to see the entertainment at 10:30 p.m. Some 5% of the Ciroette patrons did in fact avail themselves of this opportunity. The Government assessed a cabaret tax based on 5% of the receipts taken in by the Ciroette Room.

#### XXVII.

It was stipulated that if any tax is due it is to be computed on the basis of 5% of these receipts and the only question presented for consideration is whether as a matter of law the cabaret tax applies to this 5%.



## XXVIII.

The nature of these private parties being similar to those conducted in the Pavillion Room, the prior findings [179] on this subject are pertinent here and incorporated by reference. However, the reasons for denying the tax on pre-performance receipts in the Pavillion Room are even more potent here in view of the obvious remoteness of the Ciroette Room and the substantial effort and distance to be traversed for its patrons to observe the floor show.

## XXIX.

Part of the initial deficiency assessment consists of a 20% tax on all amounts paid for admission, refreshment, service or merchandise on twenty evenings when all the facilities of Ciro's were reserved by and for the members of one particular organization, referred to for convenience as "Closed House" parties.

## XXX.

On the "Closed House" occasions, the show and orchestras usually provided were the same as was regularly staged by Ciro's and Ciro's advised the private organizations as to the amount and distribution of the payments to be made to the performers if the private organizations should hire them.

## XXXI.

The private organizations themselves contracted for the entertainment and music supplied to the "Closed House" parties. In all cases checks in pay-

ment were made payable by the private groups to the performers. Private groups [180] could, if they so desired, rent the Main Room without the *Ciro* entertainment and could furnish instead their own entertainment and orchestra. Indeed, when the *Ciro* entertainers were retained by the private groups they were able to exercise control over the time when the performers would commence and the type of performance. Any service rendered by *Ciro's* was purely advisory and for the convenience of the private group.

### XXXII.

*Ciro's* did not furnish the entertainment on these twenty evenings in issue. The private organizations remained free to reject the regular entertainment appearing at *Ciro's* and if they chose to engage such performers, could modify their acts to suit their own purposes.

### XXXIII.

Although on 6 of the 20 nights in question, the public was admitted, the public was admitted only after the private groups had concluded their private parties and surrendered the premises.

### Conclusions of Law

And from these facts the Court concludes as follows:

#### I.

The statute imposing the cabaret tax is not intended to cover those pre-performance parties by

those [181] patrons whose desire to be present at the public performance was incidental to some more cogent reason for attending the cabaret, such as a private gathering of a private group or organization for the conduct of its business.

## II.

The words "entitled to be present" in the statute do not apply to the Pavillion Room or Ciroette Room parties where the main purpose of the parties engaging such rooms was other than to be present at the entertainment.

## III.

If the parties had ended before the commencement of the floor show or if the partition had remained closed and the Pavillion Room patrons excluded from entering the Main Room or observing the entertainment therein, the expenditures before 10:30 p.m. would not lie within the scope of the tax, even if the group using the Pavillion Room had arranged for their own entertainment, since under the statute there would be no public performance.

## IV.

It has been stipulated that the \$5,200.63 representing the tax on drinks served after 10:30 p.m. is equivalent to the tax on the amounts paid for food, refreshment, and merchandise by or for patrons or guests of the Pavillion Room entitled to be present during such performance for profit and is the cor-

rect amount of tax on the Pavillion [182] Room operation. The Court concludes that of the amount assessed against the plaintiff with respect to the Pavillion Room, the amount representing the service of drinks after 10:30 p.m., in the sum of \$5,200.63, is the proper tax on amounts paid by or for patrons or guests in the Pavillion Room for food, refreshment or merchandise after 10:30 p.m.

#### V.

The tax assessment on 5% of the Ciroette Room's receipts is improper.

#### VI.

After the private groups had concluded their parties and surrendered the premises, the club subsequently reverted to a cabaret status and this has no bearing on the nature of the parties from which the public was rigidly excluded.

#### VII.

With respect to the "Closed House" parties, the payments received by Ciro's did not entitle the patrons or guests to be present during public performances for profit.

#### VIII.

Defendant is entitled to judgment on its counterclaim for the tax on the amounts paid for refreshment in the Pavillion Room after 10:30 p.m. and for its costs. [183]

Judgment

In accordance with the foregoing findings of fact and conclusions of law, It Is Ordered, Adjudged and Decreed:

(1) That plaintiff take nothing by his complaint for refund of \$300.00, and that it be dismissed with prejudice;

(2) That defendant have judgment against plaintiff on its counterclaim for the sum of \$7,463.86, together with interest on this judgment until paid according to the law and for costs to be taxed by the Clerk of the Court.

Costs taxed—\$111.96.

Dated: This 25th day of February, 1958.

/s/ IRVING R. KAUFMAN,  
United States District Judge.

[Endorsed]: Filed and entered February 28, 1958. [184]

United States District Court  
Chambers of  
Judge Irving R. Kaufman  
United States Courthouse  
New York 7, N. Y.

March 13, 1958

In re: Herbert D. Hover, dba *Ciro's* vs. United  
States of America No. 20853-WM-Civil—  
Southern District of California, Central  
Division

Edward R. McHale, Esq.,  
Assistant U.S. Attorney,  
Southern District of California  
808 Federal Building  
Los Angeles 12, California

Dear Mr. McHale:

I have considered your Motions for a New Trial and to Amend and Make Additional Findings of Fact and Conclusions of Law in the above entitled action.

I am familiar with your contentions and do not feel that they warrant the granting of either motion. Nor do I feel that oral or written argument is necessary in this case. I am accordingly denying the motions in all respects.

I am forwarding a copy of this letter to the Clerk of the United States District Court, Southern District of California, with the instruction that he make the necessary notation on the motion papers.



Sincerely yours,

/s/ IRVING R. KAUFMAN.

CC: Ernest R. Mortenson, Esq.  
961 East Green Street  
Pasadena, California

John A. Childress, Esq.  
Clerk, U.S. District Court  
Southern District of California  
U.S. Post Office & Courthouse Bldg.  
Los Angeles 12, California

[Endorsed]: Filed March 17, 1958. [184-A]

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[Title of District Court and Cause.]

ORDER DENYING MOTIONS FOR NEW  
TRIAL AND MOTION TO AMEND AND  
MAKE ADDITIONAL FINDINGS OF  
FACT AND CONCLUSIONS OF LAW

The defendant having heretofore filed on January 13, 1958, a motion for new trial under Rule 59, and having on March 10, 1958, filed a motion for new trial under Rule 59 and motion to amend and make additional findings of fact and conclusions of law under Rule 52(b), and the Court having duly considered the same and the papers in support thereof and in opposition thereto, now, therefore,

It Is Hereby Ordered that defendant's Motion for New Trial filed January 13, 1958, and its Motion for

New Trial and Motion to Amend and Make Additional Findings of Fact and Conclusions of Law filed March 10, 1958, are denied.

Dated: March 28, 1958.

/s/ IRVING R. KAUFMAN,  
United States District Judge.

Approved as to Form, pursuant to Local Rule 7(a), this 25th day of March, 1958.

/s/ ERNEST R. MORTENSON,  
Attorney for Plaintiff.

[Endorsed]: Filed March 31, 1958. [186]

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[Title of District Court and Cause.]

### NOTICE OF APPEALS

To the Above-Named Plaintiff, Herbert D. Hover, dba *Ciro's*, and His Attorney, Ernest R. Mortenson, 961 East Green Street, Pasadena, California:

You, and Each of You, Are Hereby Notified that the United States of America, defendant and counterclaimant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the following judgments:

(1) From the judgment entered January 3, 1958, in favor of plaintiff as to which a Motion for New

Trial filed January 13, 1958, was ordered denied by orders entered March 17 and March 31, 1958; and from the entry of said orders of denial.

(2) From the judgment entered February 28, 1958, in favor of plaintiffs as to which Motions for a New Trial and to Amend and Make Additional Findings of Fact and Conclusions of Law [188] filed March 10, 1958, were ordered denied by orders entered March 17 and March 31, 1958; and from the entry of said orders of denial.

Dated: May 13, 1958.

LAUGHLIN E. WATERS,  
United States Attorney;

EDWARD R. McHALE,  
Assistant United States At-  
torney, Chief, Tax Division,

/s/ EDWARD R. McHALE,  
Attorneys for Defendant,  
United States of America.

Affidavit of service by mail attached.

[Endorsed]: Filed May 14, 1958. [189]

In the United States District Court, Southern  
District of California, Central Division

No. 20,853—WM Civil

HERBERT D. HOVER, dba, CIRO'S,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Honorable Irving Kaufman, Judge Presiding.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Thursday, December 19, 1957

Appearances:

For the Plaintiff:

ERNEST R. MORTENSON, Esq.

For the Defendant:

LAUGHLIN E. WATERS,

United States Attorney; by

EDWARD R. McHALE,

Assistant United States Attorney.

The Court: You may proceed.

The Clerk: 20,853-WM Civil, Herbert D. Hover  
doing business as Ciro's, vs. United States of  
America for trial.

Mr. Mortenson: Ready for the plaintiff, your Honor.

Mr. McHale: Ready for the Government.

The Clerk: Your Honor, I think the record should show that Exhibits 1, 2, 3-A, 3-B, 3-C and 3-D; 4-A, 4-B and 4-C have been marked for identification.

The Court: Very well. I would like to have an opening statement, gentlemen.

Mr. Mortenson: Very well, your Honor.

If your Honor please, since the physical set up of the plaintiff's establishment is important I would like to start with a short description of the layout of the room.

I know your Honor is familiar with the briefs filed and with the pleadings, so I shall not waste any time on the basic issues which have been set forth.

Ciro's, is, I am sure, known to your Honor. It is not only known as a night club on the West Coast but is well known throughout the United States.

It is located on what we call the "Sunset Strip."

The downstairs I might describe by using this courtroom. The main room contains a place for the orchestra and the [3\*] usual tables and chairs. You might say that the main room then would be the area from here back with the orchestra in the same position that the judge occupies.

Then there are three steps that go up to a lounge. If the lounge starts here we would say the lounge would go back to the railing.

Now originally that was all that constituted the building. Then in 1951 Mr. Hover built another building contiguous to this one. That is where the Pavillion Room is located which is the subject of one issue in the case. The new building would constitute this area where the benches are located.

Now, where the railing stands there is a base about the height of this railing—a solid base going across the full length of the room with a door in the center of the railing and there are two steps just in front of that.

Now, above the railing there is constructed a movable accordion wall. It is soundproof. And it goes to the ceiling.

When the wall is closed and the two sides come completely together no one sitting in the Pavillion Room can see anything in the main room nor can anything be heard in the main room.

In addition to this accordion wall there is a curtain, a three-ply fabric which is an additional soundproofing [4] device. That is usually closed in addition to the wall when we speak about the accordion wall being closed.

One of the issues in the case revolves around the Pavillion Room. The agents have set up a tax on the receipts from 304 private parties held in the Pavillion Room.

Now, the usual arrangement was this. Perhaps an example would illustrate it best. Suppose the Sigma Chi's were going to have their annual party. They figured on an attendance of 100. The chairman of the Sigma Chi dinner committee would call Ciro's



and would ask what the cost would be for a party of 100 at *Ciro's*.

They would be told that the Pavillion Room was available; that the wall would be closed between the Pavillion Room and the main room and that with a certain menu the dinner would cost \$6 each for the 100 people or \$600, including tips and including the local three per cent sales tax.

In some instances, or perhaps in most instances as we will learn later, this amount would be broken down into say \$5 for the meal and an additional amount for the tip and an additional amount for taxes. But the point is that in each instance an agreement was made and that was followed up by a letter which was sent to the chairman who returned one copy of the letter.

These dinners usually began around 6:30 or 7:00 o'clock. The group would come in through a separate entrance. The [5] Pavillion Room has its own entrance from the street.

There is one entrance from the Pavillion Room into the ladies' room on that floor and likewise one entrance from the men's room—from the Pavillion Room into the men's room on that floor.

There is another entrance into the same men's room from the main—well, it is really from the lounge and there is an entrance from the lounge into the ladies room.

A typical party there would be a dinner served and speeches heard. And then in some of the parties the wall would be moved open, say around 10:00 o'clock, so that those who remained at the party

could see the floor show which was currently being shown in the main room at *Ciro's*.

The Court: Mr. Mortenson, was there any representation made in advance of the renting of the *Pavillion Room*, as an inducement to renting it, that such would be the case—that these sliding doors would be opened?

Mr. Mortenson: In some cases the ones who arranged the party were told that they could remain and see the floor show, yes.

The Court: You say in some cases. Generally—I take it this will be developed during the case, but generally I take it that *Ciro's* does extensive advertising. I come from New York and we hear of *Ciro's* in New York.

The query is: As part of this advertising and the renting [6] of the facilities must be in response to this advertising. Did they hold out this inducement that the entertainment would be available?

Mr. Mortenson: In many of the advertisements it was stated that they could stay for the floor show, yes, and that will be more fully developed as Mr. Hover takes the stand because it isn't quite as easy or as simple an issue as it appears.

The Court: I understand that.

Mr. Mortenson: But that did appear in the ads—that they could stay for the floor show.

Now, the operation of a restaurant and night club business is intricate like many things in life and I have learned a lot since I got into this case about the various problems and the different techniques that

are involved with respect to private parties and the regular main room operation.

That will be filled in in detail when Mr. Hover testifies, but briefly I would like to mention this just as a frame of reference.

In the Pavilion Room there was a different menu from the one in the main room. The portions were smaller because the price was less.

There we have a table d'hote situation where it is a la carte in the main room. If they have steak, for instance, it is a 14-ounce steak in the main room where you would have [7] a 12-ounce steak in the Pavilion Room. The menu was different and the waiter situation basically is this.

The union has a completely different scale and different rules for banquet waiters from regular waiters. For instance, in the Pavilion Room a waiter could serve no more than 20 people. In the main room a waiter had a particular station and he would have to serve any number of people at the tables where he had to give his service.

The Court: When I inject and ask questions I don't want you to assume from that that I have an opinion because I don't. I am just searching for information.

Mr. Mortenson: I know what a judge means by his questions. I understand that.

The Court: Frequently lawyers, you know, are deceived in believing by the questions the judge asks indicates his thinking. There is nothing more wrong than that.

Now, why do you emphasize this point with re-

spect to the fact that a waiter could only have 20 people to wait on in the Pavilion Room and it is unlimited in the main room? What is your point there?

Mr. Mortenson: I hate to say I am glad you asked that question, Judge. I am glad you asked it.

One of our basic principles is found in *Gear vs. Birmingham* (phonetic) and I think it is something like 40 or 45 pages of opinion. [8]

The case involved less than \$200 and I remember one judge here remarking, "Well, that judge out there in Alabama," I think it was in Alabama, "must have had a lot of time on his hands." But I don't think that is the point at all.

This section that we are dealing with strangely enough goes all the way back to 1917 when it was passed as emergency legislation for the purpose of getting some money for, I guess, that was World War I, and it has been on the books since.

I don't know of any section that has been massacred more by the legislature than that one. It is a beautiful field for any expert in semantics. He could spend months there finding his way around these words. But there has been quite a lot of judicial development of the law and some of the imaginative writers in the Treasury Department have done wonderful things with regulations that have to do with that section.

Because it is so strangely written, because of the many amendments and because of the commissioner's past experiences in the courts that there is a regulation on almost everything.

Some of them are published. Some of them are letter rules. Some of them are other kinds of rules, but there is a recent ruling and I think the defendant's memorandum refers to it.

It has to do with the character of the operations. If [9] you have one common ownership and you have a taxable entertainment in one room, we will say, and then you have another room where liquor is being served and where food is being served maybe the cabaret tax applies there and maybe it doesn't.

The commissioner has some weird regulations on that that try to tell you when there is tax liability in what they call a "related room."

The Court: Is what you are trying to say to me that one of the elements we must determine is whether these adjunct rooms were part of the operation of the main room?

Mr. Mortenson: Yes.

The Court: And in determining whether it is part of the operation of the main room you then will attempt to show that it was a separate operation—different waiters, different working hours, different conditions, is that your point?

Mr. Mortenson: That is right, your Honor, because the Government, I am sure, is going to take that position and in anticipation of that I would just like to fit that in. That is it. In other words, they are going to say, "Well, this falls within our related room policy or regulations," or however they want to refer to that.

There are many other differences and I think it



is important to bring that out because you can see that the operation of a banquet room, which is what we have in the [10] Pavilion Room, is something quite different from the operation of an ordinary night club. But that was all I wanted to bring out now that there is an issue there and, of course, our witnesses can do a better job on the details.

The Court: All right.

Mr. Mortenson: Now, as I understand, the Government's position in setting up some \$55,000 in taxes on the Pavilion Room, they have the theory that if somebody from this party sees a show then it becomes a public entertainment for profit and incurs the 20 per cent tax.

Now, the plaintiff's position is that this started out as a private party. It ended up as a private party and that any receipts received during that time from the private party are not taxable under this section.

Now, we have a small issue which is pretty much resolved by stipulation with regard to the Ciroette Room.

There is a small room on the second floor of Ciro's which is used entirely for private parties. On occasions after the private party was over some members of the group there would be brought down into the lounge to see the show.

Now, we have stipulated that the number of those was five per cent, so the only issue is whether or not——

The Court: You say the number was five per cent. You mean five per cent of the total charge?



Mr. Mortenson: Yes, sir. The only issue is whether or [11] not there is a cabaret tax applicable when a guest would come from there down to witness the show.

You will permit argument at the conclusion of the case, won't you, your Honor?

The Court: Yes.

Mr. Mortenson: I want to stay away from that as much as possible.

The Court: Yes. As a matter of fact I will welcome it in this kind of case.

Mr. Mortenson: There are some words in the code that are troublesome and perhaps the cause of this whole lawsuit, but I will take that up later. I think it is clear enough if we look at the legislative history and the court decisions as to what law should apply here, with all due respect to my distinguished adversary here, Mr. McHale, who I believe also tried the Naylor case and the La Jolla case which I cited with unfortunate results.

He has a different feeling but, of course, Mr. McHale doesn't choose his cases. They are assigned to him. But the issue of the Ciroette room is basically the same as that of the Pavilion Room.

Now, we have another issue which we call the "Closed house issue."

Now, suppose, to use my Sigma Chi illustration, the next year they had a regional meeting of the alumni and they [12] figured that they would have 400 people there. Then the chairman might call Ciro's and say, "Can we have the whole house for Sunday, January 14," and Ciro's would say, "Yes;

we have nothing else booked” and then the question would come up, “Well, what about an orchestra?”

Well, as will be explained here later, *Ciro's* had a particular arrangement with one orchestra that was there for quite a period of time. Then what about entertainment? Well, *Pearl Bailey* is going to start in on Monday, the following Monday. “Maybe we can make arrangements to have her come in Sunday, the day before.”

And then the question is, “Well, who is going to make the arrangements?”

So maybe *Mr. Hover*, if *Mr. Hover* was there—I don’t know whether this is true or not, but I think it will fit the facts in general.

The Court: *Mr. Mortenson*, would this only occur on occasions such as you point out? In other words, usually in advance of the commencement date of a performer’s engagement at *Ciro's*?

*Mr. Mortenson*: That varied greatly.

The Court: What would happen in a case, for example, where *Pearl Bailey* had been playing at *Ciro's*. It is a seven day a week engagement, isn’t it?

*Mr. Mortenson*: Well now, that—— [13]

The Court: I want to get that clear.

*Mr. Mortenson*: Yes.

The Court: A seven day a week engagement. Now, what would you do—supposing it happened during the regular engagement week.

*Mr. Mortenson*: That is something that I have never completely gotten straight in my own mind and I am going to ask *Mr. Hover* to explain that carefully and in detail.

There were different ways of booking these people and I think in some cases where he had these closed house parties it would be in the midst of a regular engagement. But the rules on this—the variety artist; rules are very strict and you have to fit within those.

Now, we will have that explained. I think it varied according to the entertainer and according to the particular situation at the time. But sometimes the entertainment would be picked up before the regular engagement or after it, and I think sometimes it would be an entertainment that was booked there regularly. But the payment was on a different basis and that was true of the orchestra, too, which will be explained in detail.

When you had a closed house party the payments to the orchestra and the entertainers were usually on a different basis from the regular engagement at *Ciro's*.

The Court: And if it came during the regular engagement [14] I take it the general public would be barred that night, is that it?

Mr. Mortenson: I don't believe there is any dispute of the fact about that, that the public was not admitted.

The Court: If they came to the door that evening they would be turned away?

Mr. Mortenson: That is right. And usually there was a big sign put up that, Mr. Hover tells me, said "Ciro's closed—go to the Mocambo."

That all sounds very strange to me, that they

would send them to their competitors but that is what they usually did—they went to the Mocambo.

The Court: It seems like the antitrust division will be looking into that.

Mr. Mortenson: The public wouldn't come in because usually it was a ticket affair and somebody who was interested in the money coming in would be right there at the door and keep them out.

Now, I don't believe there has been any dispute of the fact about that. However, on a couple of instances—we have only 20 closed houses involved in this lawsuit.

The closed-house party was over early. And then after everybody left—and I don't believe there is going to be any dispute about that, everybody in the private party left then Ciro's would open up as a nightclub for the remainder [15] of the evening. That happened a couple of times, but I think our closed house issue is basically a problem of interpretation of a regulation which is, as I mentioned in my brief, a rather fantastic presumption and I am going to offer the revenue agent's report sent to Mr. Hover in evidence and that is what was set out in the revenue agent's report—that on the nights when they had closed house parties they treated that as if it was a mere reservation of tables. Those are the words used.

Now, those are the issues here and I think we will develop our facts from the witnesses. Then at the conclusion we could, I think, try to apply the cases to the facts here more intelligently.

Unless you have some questions that is all I have at this time.

The Court: Mr. McHale?

Mr. McHale: We have, if the court please, three issues in this case as Mr. Mortenson has outlined—that is three separate types of rooms or situations that were involved in the tax.

I would like to preface my statement by stating how this case is before the court.

Ciro's, of course, during this period from 1951 to 1955 reported and paid a substantial amount of cabaret tax principally on its main room [16] operations.

In 1955 an audit was made. The agent went out and examined Ciro's and discovered these three situations and determined that a certain amount of tax, additional tax should be assessed and the tax was eventually assessed and there were conferences and claims for abatement but the end result was an assessment of a tax.

Now, Ciro's paid \$300 and filed a claim for refund and brought suit.

Because of the financial situation of Ciro's the Government first asserted a jurisdictional defense that he would have to pay all the tax.

Mind you there was just one assessment for all these various periods but we withdrew that and counterclaimed for the entire amount because Ciro's was in Chapter 11 at this time and we felt we should dispose of the whole thing. So, the entire issue is before the court.

Now, it has been conceded and is in the stipula-



tion that there was an arithmetical error by Ciro's and that of the \$67,000 they do owe over \$900. So, what this really amounts to is a suit by the Government on its assessment. It is not really a refund suit except technically speaking, because the counterclaim is really the thing.

The assessment has been made by the Commissioner. The Commissioner determined this tax is due.

Now, the assessment is made for the period from 1951 to [17] the middle of 1953. The tax would have been payable on a monthly basis and then from that time on it was payable on a quarterly basis but the Commissioner assessed \$67,000 with respect to the taxes in dispute—\$66,600 some odd dollars.

The Court: Except for nine hundred some odd dollars are we in agreement as to the amount of the assessment?

Mr. Mortenson: Yes.

The Court: Then there is no problem there.

Mr. McHale: They agreed the \$992 is due the Government.

The Court: Now, the next agreement I want to have here is the agreement and understanding we made in chambers today, and that was that if eventually the disposition of this case is made upon a breakdown such as of the charges after the entertainment tax—upon charges after the entertainment commenced, that the court will not have to compute the amounts for you gentlemen but that you will, after I have enumerated the proposition by a de-



cision, agree between yourselves as to the amounts that are owing, is that correct?

Mr. Mortenson: Mr. McHale and I are agreed on that.

Mr. McHale: That is correct.

Mr. Mortenson: That we give you such a computation if you require it or if you request it.

The Court: Well, the point is that I am apt to write this opinion after I get back to New York and the chances are [18] I will not be requesting too much after I get back.

Now, I should really, I suppose, in advance ask for this before you complete your case but I was hoping that we could avoid it by a stipulation between yourselves.

Mr. Mortenson: We can agree on a stipulation, I am sure.

Mr. McHale: I am sure we can.

We have a local rule, Rule 7 in this District, which is comparable to the Tax Court Rule 50 which permits the computation. This goes a little beyond. It requires an agreement as to the amounts but I am sure we can agree upon that if your decision is based upon such a premise.

The Court: All right.

Mr. McHale: Now, the agents went into Ciro's and examined the books and records. They determined what the practice had been. In other words they found out that on at least 304 occasions there had been these private parties in the Pavilion Room, and 255 occasions there had been these parties—at least 255 occasions, there have been the

parties in the Ciroette Room and on more than 50 occasions there had been these so-called closed house parties where the entire facilities were taken over by some organization.

The Court: Let me have those figures again. How many occasions was the Pavilion Room?

Mr. McHale: 304 occasions.

The Court: Yes, and the Ciroette Room? [19]

Mr. McHale: 255 occasions.

The Court: And the closed house?

Mr. McHale: I am not sure of the actual amount. It is over 50—between 50 and 55.

The Court: Mr. Mortenson said about 20.

Mr. McHale: 20 are taxable. 20 the Government has assessed the tax against.

The Court: Now, with reference to the Pavilion Room, have the Government assessed against 304 parties?

Mr. McHale: No. This is what the Government has done. The Government went into the Pavilion Room. They looked at the books and records. The books and records didn't show how many parties were held in the Pavilion Room. All they stated was the amount of receipts from the Pavilion Room and they went in—in their examination they examined other records of Ciro's, such as Ciro's reservation file where they made these letter agreements, and they found 304 of those.

They examined those and came to a conclusion after the examination and various investigations, that 96 per cent of the receipts of the Pavilion Room were taxable.

The Court: Will you illustrate during the course of this trial how they arrived at this 96 per cent?

Mr. McHale: Yes, sir.

The Court: Apparently there is no agreement on that. [20]

Mr. Mortenson: Yes; there is as to how they did it. Actually it is 94 per cent.

What they did was to take the percentage of cabaret tax which applied to the main room, and that being 94 per cent, they used that for the Pavilion Room. We are agreed on that.

The Court: You are agreed on that?

Mr. Mortenson: Yes.

Mr. McHale: As to the Ciroette Room they took only five per cent of the proceeds and we have stipulated as to that, so there is no question on the Ciroette Room. In other words, if the tax is due then five per cent of the proceeds are taxable.

The closed house—the agents examined——

The Court: I am curious as to what happened to the other six per cent in the main room.

Mr. McHale: The agents determined that six per cent of the proceeds of the sales of the main room were by people who came in to dine and had a drink and left before the show started.

The Court: All right.

Mr. McHale: Ciro's is the type of nightclub, as the evidence will show, that really doesn't get going until 9:00 o'clock or so and not many people come in before that hour. Most people go there to see the show so that is a small portion of the sales. [21]

The closed house parties, the ones where they re-

served the facilities for one group for most of the evening, the agents found over 50 of those but they didn't say that 50 of those reservations were taxable.

They looked at the criteria which the Commissioner has set forth and determined in those instances in which they used the regular *Ciro's* floor show and what amounted to a mere reservation of tables, as Mr. Mortenson has noted in his opening statement, on those 20 occasions 100 per cent of those receipts were taxable.

These are just the selected ones that they felt fitted within the criterion. There were many parties, for instance, where a group would bring in their own entertainment—wouldn't use *Ciro's*, so they made no attempt to tax those.

There were other occasions when they used the entertainment that was playing at *Ciro's* but they made arrangements themselves with the entertainers. In other words, they went to them and said, "We want you for this evening," but on those occasions when they went to *Ciro's* and said, "We want to reserve your place for tonight; we want your regular floor show," and *Ciro's* arranged everything. They may still have paid by check to the entertainers but *Ciro's* arranged everything and those were the ones that were determined to be taxable 100 per cent.

Now of the 20 there were a few occasions on which there [22] were taxable receipts—the books also show taxable receipts on that night in the restaurant because during that evening the public, in addition

to the people in this party, were admitted and **Ciro's** considered it taxable. It was only about six out of 20 but I think the agents have found that number where the public—the general public was allowed to come in.

One further thing with respect to these closed-house parties.

The people who would attend these parties—some group would arrange for the party. It might be a community charitable organization or a working group of some kind or other and they would arrange as to who could come to the thing and they could operate under any system that they desired. It would depend upon a particular group. They could sell their tickets to anybody—I mean as far as they were concerned, but it was still the general public. The only difference would be was that it was their group who was sponsoring the party.

That in essence is what was done.

The agents assessed or set up the tax. The Commissioner assessed the tax and the plaintiff—the taxpayer here disputed the tax.

One of the things that appears in this case is a lack of records of the taxpayer to show any of these breakdowns, [23] for instance, as came up in a conference in chambers. That was brought up by Mr. Mortenson: "What were the receipts after the curtains in the Pavilion Room were drawn open at 10:30 and the show started? What were the taxable receipts?" We don't know. And the reason we don't know is that the taxpayer had no way or attempted in no way to segregate those receipts. In other



words, all the receipts of the Pavilion Room are entered either in food or drink records but they don't segregate as to what happened before the curtain was open or after.

And, secondly, and it isn't really an important part of the case, but it is one of the criteria we should look for and that is the fact that there was this door, just like this door in the courtroom, separating the back of the courtroom from the front through which people could go down to the main room and dance in the main room. In other words, they could go down and dance to the regular orchestra. There was a passageway leading from the Pavilion Room into the entry and then into the front room and they could go around that way and dance in the main room.

Now, I am not saying a large amount went there but it wasn't restricted. People could go back and forth, and dance and participate in the activities in that room.

Now, why is that important? Well, it is important because the statute says those people who are entitled to [24] go in and participate in the entertainment, anything paid by or for them is subject to the tax. That is what the statute says.

Well, it is the Government's position essentially that the Pavilion Room receipts are taxable; that they were just as much a part of this cabaret as the people in the main room who came there. Certainly the circumstances were different but mind you in a period of between June of 1951 and April 1st of



1955 there were some, almost 600 private parties in this period of two and a half or three years.

So, it was an integral part of Ciro's operations. There is no doubt about it as far as the closed-house parties are concerned.

The Court: How did you arrive at the figure of 304?

Mr. McHale: As to the Pavilion Room we don't know the exact number of parties. Ciro's has records of 304 parties. We don't know how many actually there were. There were probably a few more than that. Some files may have been lost. One group may have had a party two or three times during the period.

There are 255 of the Ciroette Room parties and approximately 50 closed-house parties.

The Court: But you said in your opening there were 304 Pavilion Room parties and just now you said 600.

Mr. McHale: I meant parties—what I meant was private [25] parties of all sorts. All I am trying to show is that this was an important part of the whole Ciro's cafe operations—the advertisements, the inducements held out to the public that they could see the show. That was all a part of the cabaret operation. That is all I am trying to point out.

There is no question that the evidence will show that the opportunity to go to Ciro's and see a show rather than to some place that would just be a restaurant or just some place where the people would hire their own orchestra and dance was an important thing that caused many of these groups to select

Ciro's. In other words, it was an opportunity to see the floor show and this was held out to the public by and large in advertising widely published in the metropolitan newspapers and in other ways during the period involved.

It is the Government's position that the burden of proof of showing any portion of these receipts are non-taxable is on the taxpayer.

The regulation specifically requires the taxpayer to maintain records showing this and there is no doubt that the evidence will show that the taxpayer did not maintain such records, although he could have done so.

Mr. McHale: There is one thing we didn't take up with the court. We do have the situation of a refund suit and counterclaim. I suppose the order of proof would be the same—that is, that the taxpayer would commence—— [26]

The Court: I should think so. We might as well take our short recess at this time.

(Short recess.)

The Court: There is one other thing to clear up, Mr. Mortenson.

In the event that I decide that the operation of the Pavilion Room is part and parcel of the main room operation, you are not contending that if that is so that there should be a breakdown in the apportionment of the tax for food served before the entertainment and charges after the entertainment.

Mr. Mortenson: Well, actually until I came into chambers this morning I didn't realize that this assessment had applied to anything but the pay-

ments for the private parties themselves. That was my understanding of the assessment.

Now, I assume this, without having given it too much thought, that if you deem the sales in the Pavilion Room to be taxable just like sales in the main room, then your judgment will be for the amount that is set up here.

I believe I am correct. Is that not right, Mr. McHale?

Mr. McHale: That is as I understand it.

The Court: I know what my judgment would be for, but I want to know what you contend. Would you agree there should be no splitting under those circumstances of the charges and the tax on the charges so that the tax—that the tax [27] will be a separate tax only for charges made after the entertainment went on.

Mr. Mortenson: Well, I don't really understand the question.

If sales in the Pavilion Room are taxable, we will say before 10:30, then they are bound to be taxable after 10:30.

The Court: I think you have answered my question.

Mr. McHales: Before we start, I meant to hand the court this earlier. I have made an analysis of the stipulation, joint Exhibit 2-B. If I may file it and serve a copy on Mr. Mortenson.

The Clerk: Mr. McHale, this is really going to be Plaintiff's Exhibit 2. You have indicated it is Exhibit 2 for you and B for the defendant. is that right?

Mr. McHale: That is how we had set it forth. It is just an analysis for the court.

The Court: This is not an exhibit?

Mr. Mortenson: If your Honor please, I have, of course, not seen this until just now. I notice on page 3 it begins:

“For almost all of the parties it was contemplated between Ciro’s”  
and so on.

This looks to me like an argument and I don’t believe it [28] should be labeled “a stipulation.”

The Court: It is not labeled “a stipulation.”

Mr. McHale: It is our analysis.

The Court: It is not a stipulation. It is the Government’s analysis of the stipulation and this is his interpretation of it.

Mr. Mortenson: I don’t understand it being submitted now.

Mr. McHale: Well, you submitted a memorandum this morning.

The Court: All right.

Mr. McHale: I felt the exhibit itself was rather difficult to comprehend.

The Court: You are so right. I glanced at it the other day and the exhibit itself looked like a Chinese puzzle.

All right, Mr. Mortenson, do you want to proceed?

Mr. Mortenson: Before I call a witness should we introduce the exhibits which we have stipulated may be entered in evidence?

The Court: All right, let us do that.

Mr. Mortenson: We offer as Plaintiff's Exhibit No. 1.

The Court: What is it?

The Clerk: Additional tax assessed.

The Court: All right. [29]

(The exhibit referred to was marked Plaintiff's Exhibit 1 for identification.)

The Court: I usually like some sort of a brief description of what the exhibit is that you are offering. It may be received in evidence.

(The exhibit referred to was marked Plaintiff's Exhibit 1, was received in evidence.)

Mr. Mortenson: I offer as Plaintiff's Exhibit 2 a summary of the records pertaining to 304 private parties held in the Pavilion Room.

The Court: Received.

(The exhibit referred to was marked Plaintiff's Exhibit 2, was received in evidence.)

Mr. Mortenson: And there is offered as Plaintiff's Exhibit 3-A, 3-B, 3-C and 3-D. They are exemplars of agreements had with the chairman of the various private parties held in the Pavilion Room.

The Court: Received.

(The exhibits referred to, marked Plaintiff's Exhibits 3-A, 3-B, 3-C and 3-D, were received in evidence.)

Mr. Mortenson: And as Plaintiff's Exhibits 4-A, 4-B and 4-C, exemplars of typical advertisements placed by *Ciro's* in local newspapers.



The Court: Plaintiff's Exhibits 4-A, 4-B and 4-C admitted [30] in evidence.

(The exhibits referred to, marked Plaintiff's Exhibits 4-A, 4-B, 4-C and 4-D were received in evidence.)

Mr. McHale: I think the stipulation of facts should be offered also.

The Court: Yes; I have the original here.

Mr. Mortenson: I understand from the clerk that they had already been filed.

The Court: It is filed as a court paper. Do you want to offer it as an exhibit? I don't see that it is necessary to offer it as an exhibit unless you gentlemen want to do so. It is up to you.

Mr. McHale: That has been our custom.

The Court: How do you want to mark it?

Mr. McMale: These are really joint exhibits.

Mr. Mortenson: The others are plaintiff's so this should be, too.

Mr. McHale: There is one thing about this that I want to mention to the court with respect to paragraph 9 of the stipulation. It has to do with the use of the words "five per cent of the patrons of the Ciroette Room during the period involved did participate or witness the entertainment in the main dining room by being taken to the main floor by the management to witness the floor show at the conclusion of the Ciroette Room parties." I didn't mean this to convey the [31] idea that the Ciroette Room party was over at this stage of the game. I would like that part to be deleted.



The Court: Is that agreeable?

Mr. Mortenson: That is agreeable.

The Court: All right, we will strike out the words "at the conclusion."

Mr. McHale: Thank you, your Honor.

The Court: All right. It may be entered as an exhibit.

The Clerk: Plaintiff's Exhibit No. 5 in evidence. It is a stipulation of facts and is admitted in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 5, was received in evidence.)

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### PLAINTIFF'S EXHIBIT No. 5

In the District Court of the United States for the  
Southern District of California, Central Di-  
vision

No. 20853-WM Civil

HERBERT D. HOVER, dba CIRO'S,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

### STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto through their respective counsel, without prejudice to the rights of any party herein to introduce additional evidence not consistent here-

Plaintiff's Exhibit No. 5—(Continued):

with and without prejudice to their right to object to the materiality or relevancy of any of the facts agreed to as follows:

I.

On November 14, 1955, the authorized delegate of the Secretary of the Treasury assessed against Herbert D. Hover, dba *Ciro's*, cabaret taxes for the period June 1, 1951, through March 31, 1955, in the sum of Sixty-seven Thousand Six Hundred Sixty Dollars and Sixty-two Cents (\$67,660.62) taxes and Seven Thousand Eight Hundred Fifty-eight Dollars and Fifty-one Cents (\$7,858.51) interest, for a total assessment of Seventy-five Thousand Five [32-A] Hundred Nineteen Dollars and Thirteen Cents (\$75,519.13). Notice and demand for payment of the said taxes and interest was made upon the Plaintiff on November 16, 1955, and he paid the sum of Three Hundred Dollars (\$300.00), and no more, on August 7, 1956. The outstanding balance of said assessment is Seventy-five Thousand Two Hundred Nineteen Dollars and Thirteen Cents (\$75,219.13), together with interest as provided by law.

II.

The aforesaid deficiency assessment of cabaret taxes represented additional taxes assessed with respect to three phases of Plaintiff's operation for the period involved; the *Ciroette Room*; the *Pavilion Room* and the *Closed House parties*. There will be introduced into evidence as Joint Stipulation, Exhibit 1, the computation of Revenue Agent Bernard

## Plaintiff's Exhibit No. 5—(Continued):

J. O'Connor, showing in detail by taxable periods the amount of additional assessed tax attributed to each of the aforementioned operations. Of the total assessment of Sixty-seven Thousand Six Hundred Sixty Dollars and Sixty-two Cents (\$67,660.62), Nine Hundred Ninety-two Dollars (\$992.00) is attributable to "main room operations" and is conceded to be due and owing by the Plaintiff because of a clerical error and is not in issue in this law suit.

## III.

The amounts of the respective deficiencies in tax determined by the Revenue Agents who made the audit, was based on their examination of Plaintiff's books and records and applied the cabaret tax to a certain percentage of the receipts of each room on a basis that is more fully detailed hereinafter. The taxpayer did not consider the receipts of the said rooms taxable and, consequently did not, in his books and records, segregate any portion of the receipts as Federal cabaret taxes.

## Facts Respecting the Pavilion Room

## IV.

1. During the taxable period involved, Plaintiff operated the Pavilion Room on the same nights as the main room in which there was entertainment. Taxpayer has records showing the arrangements for 304 of the parties held in the Pavilion Room during

## Plaintiff's Exhibit No. 5—(Continued):

said period. To be introduced into evidence as Joint Stipulation, Exhibit 2 is a summary of the Plaintiff's records regarding reservations of the Pavilion Room during said period, together with a key to the comments and information contained on such summary. Said Exhibit refers only to arrangements made in advance and does not purport to be evidence with respect to what actually happened at any of the parties involved. The tax shown in Exhibit 1 was not computed from the above records but from other books and records.

## V.

To be introduced into evidence as Joint Stipulation, Exhibits 3-A through 3-D, inclusive, are authentic copies of representative records of the Plaintiff from which the summary, Joint Exhibit 2-B, was made.

## VI.

To be introduced into evidence as Joint Stipulation Exhibits 4-A, 4-B, 4-C are advertisements of *Ciro's*, typical of the kind and type of advertisements run by *Ciro's* in its own and outside publications during the period involved.

## VII.

With respect to the *Ciroette* Room, there is no issue as to the percentage of the receipts subject to the cabaret tax, Plaintiff conceding that if a tax is due as a matter of law, then 5% of the receipts are taxable.

## Plaintiff's Exhibit No. 5—(Continued):

## VIII.

Plaintiff maintained records showing receipts and the computation of the cabaret tax as reported on the tax returns, but Plaintiff kept no records showing what, if any, proportion of the [32-C] persons who attended the parties in the Pavilion Room stayed for the floor show or for dancing.

## IX.

The Ciroette Room is a separate room on the second floor of the establishment reached by a stairway and the patrons of this room could not see or hear any part of the entertainment in the main dining room. Five per cent of the patrons of the Ciroette Room during the period involved did participate or witness the entertainment in the main dining room by being taken to the main floor by the management to witness the floor show ~~at the conclusion of the Ciroett parties.~~ The only issue with respect to the Ciroette Room is whether, as a matter of law, the cabaret tax applies to this five per cent.

/s/ ERNEST R. MORTENSON,  
Attorney for Plaintiff,

LAUGHLIN E. WATERS,

By /s/ EDWARD R. McHALE,  
Attorney for Defendant.

Dated: 17th day of December, 1957.

Received in evidence December 19, 1957. [32-D]



Mr. Mortenson: Will you rise, Mr. Hover?

Your Honor, before I start my direct examination, is it your preference to have counsel stand when examining a witness?

The Court: Yes, it is. Do you have a different custom here in this District?

Mr. Mortenson: Well, the judges vary on that.

The Court: Yes, we always have them stand in New York. I have been sitting in San Francisco and some of them, off the record, must have gotten flat feet but they were standing. [32]

### HERBERT D. HOVER

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Herbert D. Hover.

### Direct Examination

By Mr. Mortenson:

Q. Mr. Hover, will you tell us something about your educational background?

A. Well, I attended Columbia University for over six years and I am a graduate of the Columbia University Law School and a member of the Bar of the State of New York, and a member of the Federal Courts for the Eastern and Southern Districts of New York.

I taught—I was an editor and publisher at one time and wrote articles.

The Court: Editor and publisher of what?



(Testimony of Herbert D. Hover.)

Q. (By Mr. Mortenson): You are the owner and operator of *Ciro's*, are you not?

A. Yes, sir.

Q. And how long have you operated *Ciro's*?

A. 15 years.

Q. Prior to that what was your occupation? [33]

A. Well, immediately prior to that I was associated with about four or five corporations. I was president of these corporations, one of which was a Hollywood restaurant corporation. I don't quite recall the others. One I think was called "Trans-National Talent, Hollywood Productions, Inc."

I did that for a period of four years, from 1938 to 1942, and before then I lived in New York where I practiced law and produced shows.

Q. Now, in addition to your writing for magazines are there any distinctions that you could mention here that would tell us something about your background?

A. Well, I am listed in *Who's Who* and am honorary chairman—I don't know whether this is a distinction or not, but I have been a star—I wrote, directed and produced one of the top shows for CBS.

I worked for NBC—ABC, which is the American Broadcasting Company. I had my own show which I wrote, directed, produced and starred in.

I wrote two scenarios for motion pictures which were bought and——

Q. Now, with regard to *Ciro's*. Are you personally familiar with the operations from June 1st, 1951, to April 1st, 1955?

A. Yes, sir, I am.

(Testimony of Herbert D. Hover.)

Q. And your familiarity is due to your personal supervision, [34] is that correct?

A. Yes, sir. May I interrupt? You asked me something else. I was formerly a lawyer with the Federal Government.

Q. What department were you in?

A. With the Department of Commerce from 1933—during 1933 and 1934.

The Court: Let me interrupt for a moment, Mr. Mortenson. In those instances when music was piped in for dancing in the Pavilion Room, do I understand dancing actually takes place in the Pavillion Room?

The Witness: Yes, there is a dance floor there.

Q. (By Mr. Mortenson): Mr. Hover, there was an examination of your cabaret tax returns by two agents by the name of O'Connor and Ross, is that correct?

A. Yes, sir.

Q. Subsequent to that examination did you receive a report concerning a proposed assessment?

A. Yes, sir.

Q. Mr. Hover, will you give a description of the physical layout of the first floor of Ciro's?

A. Well, the first floor—what was generally referred is the "main room," is rectangular in shape and there is, as you described, there is a band stand corresponding to where the judge is sitting, and directly in front, which is [35] elevated, directly in front is a dance floor and around the dance floor are tables, chairs and tables.

And looking eastward we walk up three flights

(Testimony of Herbert D. Hover.)

of stairs and we have what might be considered another room. We refer to it as "the lounge" and south of the lounge is a foyer through which you went into the main building.

And further east in back of the lounge is another building and in this building is the Pavilion Room, which is approximately three steps above the lounge.

In the lounge we have an extra step and then from that elevation there are two steps into the Pavillion Room.

As you enter Ciro's from the foyer into the lounge you face west for the dance floor and the orchestra, but as you went to the Pavillion Room from the street the dance floor and the orchestra, you would face south to view the dance floor and the orchestra.

Q. Now, will you state the history of the Pavillion Room—its construction?

A. Well, it was constructed in 1951 and was opened in 1952.

It was put up there basically for private parties. We had been doing some private parties. We had opened a room in 1948 which we called the "Ciroette Room" and it was a rather small room so we constructed another room which we called the "Pavilion Room" which was put in another building.

Q. As far as the Pavilion Room is concerned then, as I understand your testimony, it is in a separate building from the one in which the main room was located and the lounge—it is in a separate building but the two buildings were joined?

(Testimony of Herbert D. Hover.)

A. Yes, sir. Under the building code it is classified as a separate building. It was also constructed about 20 or 30 years after the construction of the Ciro's building.

Q. Mr. Hover, I show you a document. It bears the notation at the top "Name and address of taxpayer. Herbert D. Hover, D.B.A. Ciro's, 8433 Sunset Boulevard, Los Angeles, California," and that is dated 9-29-55. "Examining officers B. J. O'Connor, Chester M. Ross," and I will ask you whether this is a document which you kept in the regular course of business? A. Yes, sir, it is.

Mr. Mortenson: This is offered as Plaintiff's Exhibit next in order.

Mr. McHale: I object to the materiality and relevancy of this document. It does not bear on any of the issues in this case.

The Government has assessed the tax. The assessment is the key here and not a document.

The Court: What is the relevancy?

Mr. Mortenson: The relevancy of the document, your Honor, [37] is the basis for the assessment.

This document bears the breakdown of the taxes and the amount of the assessment. It is a further explanation of the joint or Plaintiff's Exhibit 1.

The Court: Where is Exhibit 1?

(Document handed to the court.)

The Court: Oh, yes. What do you mean by "a further explanation"? Isn't Exhibit 1 complete enough?

(Testimony of Herbert D. Hover.)

Mr. Mortenson: No, your Honor.

The Court: Let me look at this. Is there any conflict between the figures in Exhibit 5 for identification and 1 in evidence?

Mr. Mortenson: No, your Honor.

The Court: I will receive it in evidence.

Mr. McHale: There is one further thing, your Honor. May I be heard again on this?

The schedules are here. We have no objection to it but the preliminary statement which I believe is on page 3 we do object to as the reason—as I understand Mr. Mortenson's statement, the reasons the Government made for assessment is contained, or the reasons are contained therein. We don't believe this is material or relevant. If it is this is but a part of the report, the report upon which the Government acted which is contained in several other pages which are not sent to the taxpayer. [38]

For that reason we feel that this page 3 should be excluded and if not then the entire report should be introduced into evidence.

The Court: Where is the entire report?

Mr. Mortenson: We have no objection to that.

The Court: Do you want to introduce the balance of the report? Do you want to do that now or do you want to do it later?

Mr. McHale: I will do it later.

The Court: Then let it be marked for identification.

Mr. Mortenson: I will offer it now.

The Court: Very well.



(Testimony of Herbert D. Hover.)

The Clerk: Plaintiff's Exhibit 6 marked for identification and admitted.

Mr. Mortenson: In stipulating that the rest of that report may go in, I am thoroughly conscious of the fact that it is going to have a lot of self-serving statements in it and I know that the judge will consider that in reading the report.

The Court: Certainly. As a matter of fact, basically, that is the reason why I have admitted this. I think the judge is, as distinguished from a jury, capable of deciding what he should give weight to and what he should not give weight to.

Mr. Mortenson: Precisely, your Honor. [39]

(The exhibit referred to was marked Plaintiff's Exhibit 6 and received in evidence.)

The Court: Go ahead.

Q. (By Mr. Mortenson): Now, in this report that was made out by the agents, there are three categories of assessments, Mr. Hover. Is that correct? A. Yes, sir.

Q. And you understand the theory on which the Government has assessed these taxes, do you not?

A. I believe I do. You mean the theory being used at this time?

Q. Yes.

A. The theory has changed from time to time.

Q. Yes. Now, starting with the Pavilion Room parties. You know that 304 of them are involved here by stipulation, do you not? A. Yes, sir.

Q. Now, with respect to the parties held in Pa-



(Testimony of Herbert D. Hover.)

villion Room that are in issue in this action, will you explain how arrangements were made with the representatives of the groups that held those parties?

A. Well, the contract would be entered into relating to the dinner to be held in the Pavillion Room.

It was invariably a signed contract and it stipulated the time when the party would come in. There was stipulated [40] a uniform dinner for every person. The dinner would normally be a uniform dinner for everyone.

The price—and it would be subject to state tax, which I believe was four per cent although it may have been three per cent during part of this time. And also payment of the tip.

It stipulated the number of people who would attend. In other words, the contracts would normally stipulate between two figures, let us say, between——

Q. Just a moment. I show you Plaintiff's Exhibit 3-A and ask you whether that is one of the contracts you are speaking about.

A. This is a contract but it is not a typical contract.

Q. Take Exhibit 3-B. Would you say that is a typical contract?

A. No, sir. It is a contract but it is not a typical contract.

Q. Now, with respect to these parties—I mean the 304 which are listed in Plaintiff's Exhibit 2, you had 304 written contracts, is that right, one for

(Testimony of Herbert D. Hover.)

each party?           A. Yes, sir.

Q. Then let us go back now to the typical contract. What would be the provisions, forgetting about this exhibit for the time being?

A. Well, the menu would be stipulated, the price per [41] person, the payment of the state tax and sometimes it would be plus gratuities and at other times a gratuity would be set forth such as 10 or 12½ per cent; the time the people would come in, the approximate number with the provision that a more definite number would be given to us like three days before the party, which would constitute the minimum guarantee.

Also included was the price of drinks and the time of arrival and the time the dinner would be served. The deposit and——

The Court: How about departure time?

The Witness: Departure time? I don't think so. It was not in the contracts, no, sir.

The Court: May I see one of the contracts?

(Document handed to the court.)

The Court: I am now examining Exhibit 3-A. This has gone into evidence, has it not?

The Clerk: Yes.

The Court: You haven't marked it in evidence.

The Clerk: I have it marked on my master sheet.

The Court: What was the reason for providing in here, Mr. Hover, that the drinks will be charged

(Testimony of Herbert D. Hover.)

for at the rate of 75 cents per drink until show time and 90 cents per drink thereafter?

The Witness: Well, many parties would want a bar open [42] for only one hour or an hour and a half. In that case we would not have to hire an extra bartender. We would use one of the bartenders regularly on duty.

It would be 75 cents if they used a regular bartender, but if they wanted an extra bartender it would cost us about \$20 for the evening which would mean that we would have to take in about \$30 more to pay for the bartender.

The Court: My question is why is there a specific reference "until show time, 10:30 and then 90 cents per drink thereafter"?

The Witness: I am trying to explain that, sir.

The Court: What I am trying to get at is, was there anything held out to the individual that they could see the floor show?

The Witness: In some cases, yes.

Q. (By Mr. Mortenson): Pardon me. I don't think you made clear, Mr. Hover, the relationship between the 90 cent drinks and the 75 cent drinks insofar as an extra bartender was concerned.

A. May I explain that?

Q. Yes, explain that again.

A. If they wanted a bartender all night it would cost us about \$20 more, so we charged—you see, when people call for a party they say, "What do you charge for drinks, for standard drinks?" And we say, "75 cents." [43]

(Testimony of Herbert D. Hover.)

Sometimes they would say, "What do you charge for de luxe brands," and we say, "90 cents."

Now, if they wanted a bartender all night we would tell them from 10:30 on the drinks would have to be 90 cents.

The Court: That is what I am getting at. Why is it 10:30?

The Witness: Because until that time we could double up on our bartenders and by doing that the bartender wouldn't cost us anything extra. We would charge 75 cents a drink as long as we could use one of the regular bartenders.

The Court: What happens after 10:30? Why couldn't you double the bartenders after 10:30?

The Witness: That would mean we would have to have a bartender on all night for that bar.

The Court: I daresay that is not clear to me. Is it clear to you, Mr. Mortenson?

Mr. Mortenson: Yes. First of all I will explain the situation of the bar in the Pavilion Room.

Q. (By Mr. Mortenson): First of all, how many bars do you have in Ciro's?

A. We have four bars. We have a service bar which is in the kitchen. We have a bar in the lounge. We have a bar in the Pavilion Room and we have a bar in the Ciroette Room.

Now, let us say we had two, or let us say we had three [44] bartenders on duty. Now, if we had three bartenders on, and if there was a party in the Pavilion Room we could double one of those three bartenders in the Pavilion Room if they wanted him

(Testimony of Herbert D. Hover.)

only until the early part of the evening—until after 10:30.

If they wanted them beyond 10:30 that meant we had to get an extra bartender in which costs approximately \$20.

The Court: I still want to know why it is at 10:30. Is there something sacred about 10:30?

The Witness: Because the show would go on shortly after 10:30 and that meant the bartenders would be busy at the other bars. The bartenders would not necessarily be busy before 10:30 so we can take one of those bartenders and move that bartender into the Pavilion Room, but after 10:30 if they wanted a bartender that meant we had to get an extra bartender and pay him for a full night's salary. Up until 10:30 supplying a bartender to the Pavilion Room did not cost us anything extra.

The Court: What time does the show go on?

The Witness: It goes on sometime between—if we did two shows, the show would normally go on between 10:30 and 10:45. At that time the bars would not be busy.

The Court: After 10:30?

The Witness: After 10:30. And that means we can bring the man back. [45]

The Court: Then if you can bring the man back my point is why should the price go up?

The Witness: After 10:30?

The Court: Yes.

The Witness: Because if we want a bartender all



(Testimony of Herbert D. Hover.)

night that meant we would have to hire an extra bartender for the Pavilion Room.

The Court: You mean after the show was over when you had to move the bartender back to his bar at 11:30 and they start serving drinks again?

The Witness: We would need—in other words, if anyone wanted a bartender to stay after 10:30 it meant we had to get an extra bartender because we would need the regular bartenders some place else—we would have to get an extra bartender at a cost of \$20 to serve the party in the Pavillion Room.

The initial price we quoted for drinks was 75 cents. If they asked about de luxe or name brands we would say they are 90 cents and if they wanted a bartender all night it would be 90 cents after 10:30 because we didn't want to go back on our word as far as charging more than 75 cents a drink.

Q. (By Mr. Mortenson): Now, I understand then that the 15 cent differential between 75 cents and 90 cents was to pay for a bartender you had to bring in because they [46] wanted service until closing time, is that correct?

A. Because they wanted service, yes, sir, until—for an indefinite hour after 10:30.

Q. And whether the bartender came in at 10:30 or 11:00 or 11:30 you would still have to pay him for a full shift, is that correct—is that the way it works?

A. No. If we needed a bartender to stay after 10:30, we have to have an extra bartender and pay him. A bartender could tend bar in one of these



(Testimony of Herbert D. Hover.)

private rooms until 10:30. It would not cost us anything extra up until approximately 10:30. It would not cost us anything extra and therefore we charged the private parties 75 cents a drink as distinguished from a \$1.10 a drink which we normally charge.

The Court: I am confused again. I thought you told me between 10:30 and 11:30 the bartenders are not busy and you can take a bartender from another bar and move him into this Pavilion Room where the private party is without hiring another bartender.

The Witness: I am sorry. I wasn't very clear.

The Court: Now, then, what is the story between 10:30 and 11:30 when the show is on you said—I thought I understood you to say the bars are not too busy.

The Witness: That is right.

The Court: And therefore you could take a bartender from one bar and move him to another where they needed extra [47] service.

The Witness: Well, sir, I think I can be a little more explicit if I use an example.

Let us say we have three bartenders on duty.

The Court: Three separate bars?

The Witness: Yes. We would have one, let us say, in the service bar, one in the lounge and one, let us say, in the Pavillion.

The Court: All right.

The Witness: Now, up until this time it did not

(Testimony of Herbert D. Hover.)

cost us anything extra to put a bartender in the Pavilion Room because at 10:30, or, let us say shortly after 10:30 the show would start and the bars were not very busy, so the bartender in the service bar, which is located in the kitchen—he would normally stay where he was during the show time. One of the other two bartenders, the bartender at the front bar or Pavilion bar—he would relieve the other bartender who had gone to eat. We would have three bartenders, two in the lounge and one in the service bar. Let us say that at 11:00 o'clock we got very busy—it would be at its maximum.

Now, if we had to have a bartender in the Pavilion Room all night we could not do that.

The Court: By "all night" you mean until 2:00 in the morning?

The Witness: Yes, sir, 2:00 in the morning. In that [48] case we have to have four bartenders instead of three.

The Court: But you speak in terms of "all night." I want to get that clear in my mind.

In this contract, which you say is not a typical contract, Exhibit 3-A in evidence, there is just a flat statement that 75 cents per drink until show time at 10:30 and 90 cents per drink thereafter.

The Witness: Show time at 10:30.

The Court: Yes; and 90 cents per drink thereafter. And they will be paid for by the individuals ordering them. Was that the customary thing with these private parties when they stayed on beyond the end of the show?

(Testimony of Herbert D. Hover.)

The Witness: No, sir; that was more of a stock clause because you see, mostly they didn't stay on.

You see, they would let us know in advance "We will be through at 10:00 o'clock." Most of the parties were through at 10:00 o'clock but we put these clauses in because you sign a contract like this, let us say, and then a day or two before the party they will say, "Well, I think we are going to go until 2:00 o'clock in the morning."

We protected ourselves by putting in the 90 cents for a drink.

The Court: My question is, supposing they go to 11:30, just after the show and leave. What happens then?

The Witness: Well, they don't, sir—most of the [49] parties were through by 10:00 o'clock but we have to protect ourselves by putting 90 cents per drink in there.

The Court: The point you are making is that most of the parties did not stay for the show?

The Witness: In many, many cases they did not, sir, but in any event the party was over by 10:00 o'clock.

The Court: What happened in the case where they did stay for the show? That is what I am trying to get. Did you leave at 11:30 right after the show?

The Witness: Yes, sir.

The Court: And then you say "Music from the orchestra in the main room will be furnished for dancing."

(Testimony of Herbert D. Hover.)

Does that mean dancing in the Pavilion Room or in the main room?

The Witness: Piped into the Pavilion Room.

The Court: That is all evening long before the show starts?

The Witness: Well, before we would have records playing until 9:30 or 10:00 o'clock and then our band would come on and usually they play what we call dinner music until about 10:30 and that is piped into the Pavilion Room. Then the show would go on shortly after 10:30 if we did two shows—about midnight if we did one show.

The Court: Go ahead, Mr. Mortenson. [50]

Q. (By Mr. Mortenson): Now, with respect to these private parties held in the Pavilion Room, will you explain in detail the difference in the operation in the Pavilion Room from that in the main room with respect to all features that you can recall?

A. Well, I anticipated that question, sir, and I jotted down some notes. May I refer to this, sir?

The Court: Surely.

The Witness: Well, a private dinner was confined exclusively to the group and the general public was not admitted. In the main room anybody could come in.

There was a difference in table set up—in the main room we had the normal cafe setup which usually consisted of round tables of varying sizes which would seat four or six or banquet tables seating two.

In these banquets we had the banquet setup which

(Testimony of Herbert D. Hover.)

was rectangular tables which seated eight, but normally I seated 16 to 20 people at a table. In the main room we seated approximately a half as many people in the same area. There was a cover charge. And for the private dinner parties there never was a cover charge.

In the main room the patrons sat wherever they designated but in the private dinner parties they seated themselves and they also controlled the seating arrangement and ordinarily we had a dais for speeches. [51]

Q. The people who came into the main room paid no parking fee?

A. The parking, incidentally, was operated by an independent concessionaire. The people who came into the private dinner parties paid a parking fee.

In the main room prices normally were \$1.10 per one-ounce drink and for the private parties normally it was 75 cents—sometimes 70 cents a drink and sometimes lower than that.

In the main room the waiters served until closing time. We always stop the sale of beverages by 2:00 o'clock a.m. Sometimes people would stay until after 2:00 a.m.—they would stay until 2:30 or 3:00 o'clock in the morning. The waiter had to stay there. In the private rooms the waiters left as soon as dinner was served.

Q. Will you pardon me? You referred to only the Pavilion Room and the main room—you said "private room." You mean the Pavilion Room?



(Testimony of Herbert D. Hoover.)

A. Yes; I meant the Pavilion Room where we served private parties.

The Court: Are you talking only of the Pavilion Room up to this point?

The Witness: Yes, sir. In the main room patrons came in without reservations and sometimes they would telephone in advance. In the Pavilion Room it was always a prearranged [52] affair—group reservations with a designated number.

In the main room a band can work only six days and we can use an out of town band. In the Pavilion Room, if they hired musicians, they had to be local musicians only—they could not use what are called “out of town musicians.”

In the main room if a patron made a reservation and did not show up there was no liability.

The Court: With the hiring of a band—there is no contention here—I think the Government will concede if the Pavilion Room hires its own band there is no tax liability.

Mr. McHale: That is right.

The Witness: I am showing the difference between the two operations because the union recognizes the difference in the operation.

The Court: We are talking of those situations where they use the same entertainment.

The Witness: All right. In the main room if a patron had made a reservation and did not show up there was no liability. In the Pavilion Room there was liability up to the extent of the minimum guarantee.



(Testimony of Herbert D. Hover.)

In the main room there was no deposit made on a reservation. In the Pavilion Room there was always a deposit made.

In the main room the waiters worked on an eight-hour basis—in the Pavilion Room they worked on a four-hour basis. [53]

In the main room the waiters normally work from 8:00 to 2:00 or 3:00 a.m. and in the Pavilion Room they worked from 4:00 to 8:00 or 5:00 to 9:00 or 6:00 to 10:00.

In the main room the menus are a la carte. In the Pavilion Room the menu was prearranged and invariably they all ate the same food except sometimes on a Friday night there would be fish served.

In the main room each patron ordered and ate anything that he selected—in the Pavilion Room they all ate the same thing.

In the main room the prices were about 40 to 60 per cent higher than in the Pavilion Room. In the main room service was different, such as vegetables would be served in different dishes, while in the Pavilion Room the vegetables and the main order we usually served on the same plate and they were ordinarily much smaller portions.

In the main room we gave our waiters three meals a day. In the private room waiters who worked for us were served only one meal.

In the main room there was repeated trade at the same tables. That is, if some people had been sitting at a table and then left then other people

(Testimony of Herbert D. Hover.)

would come in and sit at the same table. In the Pavilion Room there was no repeat trade.

In the main room the tabs were individually paid. In the Pavilion Room all the dinners were on one tab. [54]

In the main room we presented our own shows. In the Pavilion Room there was no show at all, or if there was a show invariably they supplied their own show, unless later on some of the people did see our show in the main room.

In the main room there were no speeches. In the Pavilion Room normally speeches were made by people who attended with the group.

In the main room people normally came in at any time—usually after 9:30 and up until 1:30 a.m. In the Pavilion Room they generally came in about 6:00 or 7:00 o'clock p.m.

In the main room dinner was not compulsory—you can come in and have no dinner at all.

In the Pavilion Room unless it was an out and out cocktail party dinners were compulsory and had to be paid for whether eaten or not.

The Court: Would anybody have any objection if that were admitted as an exhibit? I would like to have it before me.

Mr. McHale: I haven't any—may I look at it?

The Witness: These are my own memos. There are some abbreviations on here.

Mr. Mortenson: May I see it?

Mr. McHale: I have no objection.

(Testimony of Herbert D. Hover.)

Mr. Mortenson: I will offer this as Plaintiff's Exhibit next in order. [55]

The Clerk: Plaintiff's Exhibit No. 7.

The Court: It is marked for identification and is admitted in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 7, was received in evidence.)

Mr. Mortenson: If there are abbreviations or misspelling, your Honor, I am sure the witness is taken quite by surprise. He shouldn't be embarrassed because it was intended only to refresh his memory and not to be introduced as an exhibit.

Q. (By Mr. Mortenson): Now, what was the method of handling tips or gratuities in the Pavilion Room?

A. Well, the tips were usually stipulated to in the contract, in the written contract, but in any event a lump tip was given to the waiters, to one of the waiters who divided it among all the waiters that served in the Pavilion Room.

Now, in the main room you tip whatever you wish and the waiter would keep it unless he shared it with his partner.

Q. (By Mr. Mortenson): Now, at what time would this single tab for the private party in the Pavilion Room be paid?

A. Well, usually about 10:00 o'clock. When the dinner was over. Might have been paid for at 8:00 o'clock or 9:00 o'clock. As soon as the dinner was over one of the men would pay the tab. [56]

(Testimony of Herbert D. Hover.)

The Court: You mean usually the chairman of the dinner party?

The Witness: Yes, sir.

The Court: And you usually would have had a deposit in advance, wouldn't you?

The Witness: Always had a deposit.

The Court: Running at about what per cent?

The Witness: Well, it wasn't based on a percentage. Usually it was \$50. In some cases it was \$100.

Q. (By Mr. Mortenson): Did the waiter in the Pavilion Room remove the dishes before they left the premises?

A. No, sir; the dishes stayed on the tables.

Q. Who did remove the dishes?

A. The bus boys would remove them at about 1:00 o'clock in the morning.

Usually when our second show was on they would go in there and remove the dishes, but all the dishes stayed on the table.

The Court: Did you use any of the same help at all in the main room?

The Witness: No, sir; we never use the same help—we never use the same help except in two instances. At one time the waiters, our waiters went to the waiters' union and got a concession which lasted a very short while, whereby they could work both rooms, but that only lasted a very, very [57] short while.

Another time, in the event of an emergency, for example, let us say we had more people coming into

(Testimony of Herbert D. Hover.)

the main room than we anticipated, we might want to use a waiter working in the Pavilion Room in the main room and then we paid him two nights' pay. But we can only do that in extreme emergencies.

A man wasn't permitted to work the Pavilion Room and the main room at the same time.

Q. (By Mr. Mortenson): In addition to paying him double salary there also was some arrangement with the union welfare fund, is that correct?

A. Yes. We even had to pay double union welfare fund. A man working in the Pavilion from 5:00 to 9:00 or 6:00 to 10:00, we had to pay four hours welfare fund. And even though we doubled him and paid him an additional salary, which was a greater salary, we had to pay him for eight hours in the main room and even though he only worked four hours we had to pay him for eight hours and also pay the welfare fund for eight additional hours. So we actually paid for 12 hours that one day for one man.

The Court: How long did that arrangement last where you used the same waiters?

The Witness: When we had the union concession?

The Court: Yes. [58]

The Witness: I am sorry, sir. I can't tell you that but I would guess a couple of months—just a few months. It was a very short while, sir. That is all I can say—maybe four months, perhaps two months.



(Testimony of Herbert D. Hover.)

Q. (By Mr. Mortenson): Now, I am sure the court would like to know about the doors.

The Witness: Pardon me. There is another difference in the Pavilion Room. A man could serve only 20 people in the Pavilion Room. Now, if by any chance, more people came to the party than we anticipated then we would have to pay a waiter 25 cents for each person over 20 that he served.

In the main room a waiter can serve an unlimited number of people. He can serve 50 people throughout the evening if it were possible to do that.

Q. (By Mr. Mortenson): Now, will you tell us the arrangement with respect to the men's room and the ladies' room as far as the Pavilion Room private parties were concerned?

A. Well, the men's room consisted of a wash room and then up about two or three steps where there was a base and then a door and that led into another room in which were the urinals and the latrines.

Now, if you went in from the Pavilion Room there was a separate door leading from the Pavilion Room into the men's room on the upper level and if you turned right you went [59] into the room where the latrines were and if you turned left you walked down two steps into the washroom.

Now, that same room was used also by the main room except the entrance to that was on a foyer through a different door—I am sorry, through the lounge—not the foyer, but through the lounge.

(Testimony of Herbert D. Hover.)

Q. Now, with respect to the ladies room. Where was that located and what doors were there to the ladies room?

A. Well, the ladies room is located right off of the foyer as you come in. Now, there is a short hallway between the Pavilion Room and the foyer and in that hallway is a door which leads into the ladies room. That is the present setup.

Before there were two doors, one leading into it at the upper level, into the ladies room from the Pavilion Room and one leading to the ladies room from the foyer.

Q. How many means of access are there aside from those to the Pavilion Room?

A. Well, access from the street—it has its own entrance. Then you can also go in from the foyer in the main building. Then if you open the wall you can go in there from the lounge. And then you can go in through a corridor which is located on the north side where the waiters normally come in from the kitchen.

And then it is also possible, but not done, to go in from the foyer into the lounge—into the men's room and then [60] from there go into the Pavilion Room.

The Court: Is this a convenient place to break for lunch?

Mr. Mortenson: Yes, your Honor.

The Court: How much longer do you think you will be with the witness on direct?

Mr. Mortenson: I would say an hour.

(Testimony of Herbert D. Hover.)

The Court: About an hour. About an hour. I want to make arrangements for us all to be able to go out and see the premises, as was urged upon me in chambers this morning.

When do you think we should do that?

Mr. Mortenson: Could we break in this afternoon in time to do it?

The Court: All right, if you want to try and make arrangements. What do you think, Mr. McHale?

Mr. McHale: I was thinking it probably would be advantageous for the court to see the premises early in the trial.

The Court: I think it is better, yes, so I will know what you are talking about.

Mr. Mortenson: Could we do it this afternoon?

The Court: After you finish your direct examination?

Mr. Mortenson: Yes.

The Court: And before we begin the cross-examination.

Mr. McHale: Yes. [61]

The Court: Maybe we will do that because I want to make arrangements for a car to take me out there.

Mr. McHale: The reporter will have to come along.

The Court: I hope you make arrangements for his transportation.

Mr. Mortenson: I will be delighted to have him.

The Court: Very well. We will reconvene at 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon a recess was had until 2:00 o'clock p.m. of the same day.) [62]

Thursday, December 19, 1958—2:00 P.M.

The Court: You may proceed.

Mr. Mortenson: Your Honor please, before Mr. Hover goes back on the stand could I take a moment to see whether we understand each other about the questions you asked?

I have taken the position in my brief that the cabaret tax should not apply until the entertainment starts. There is a regulation providing that the tax starts a half hour before the entertainment starts.

Now, that isn't an issue in this case. I didn't think it was but I thought it belonged in the brief. I had misunderstood how the agents had applied the 20 per cent. I thought the 20 per cent tax that appears in the computations here was applied on the amount that was paid over by these private parties, but I now find that it was done in a different way. I am not sure whether this is right but I believe it was, that they applied the 20 per cent to what appeared on the books as non-taxable sales, which would include not only the amount paid on the tab but also any sales made in the Pavilion Room bar after the tab was paid.

Now, let me explain—this is what I understood the assessment was—of course all sales in the main

room carried a tax. The patrons were charged 20 per cent and that was paid to the Government. There is no issue about that. [63]

Now, forgetting about the closed house sales which were charged the way I thought the Pavilion Room charges were, the agents then took the sales which appeared on Ciro's books as being non-taxable and put the 20 per cent on that. They didn't do it by going to these folders for the 304 parties, but now I come to this. I understood you to ask whether——

The Court: Excuse me. Mr. McHale, the agent will explain, won't he, during the course of the trial how he arrived at the tax?

Mr. McHale: We can certainly do that. I thought it was clearly understood by Mr. Mortenson. I didn't realize there was any doubt about it.

Mr. Mortenson: If that is the way it was done we have no problem, particularly now since we have——

The Court: Would you explain how it was done then?

Mr. McHale: As I understand it they took the receipts from the Pavilion Room, if that is the one we are talking about, and applied the tax to the receipts of the Pavilion Room and it was from the books showing the receipts of the Pavilion Room and not from any folders or anything like that. They applied the same percentage with respect to the Pavilion Room as they did to the main room and it was 94 per cent and when they got to the Ciroette Room it was only 5 per cent.



Mr. Mortenson: There is no problem on that except this. [64]

Now, I think you asked whether it was my position if the sales from the beginning of the private party until show time were taxable—what is my position about the taxability after the show starts and I think I answered that if it is taxable before show time it has got to be taxable afterwards.

Mr. McHale: That is right.

Mr. Mortenson: But I wanted to be sure that I didn't have you understand that the converse was true, that if it were taxable from 10:30 on that doesn't mean it is taxable the other way.

The Court: All right.

Mr. Mortenson: All right, Mr. Hover.

### HERBERT D. HOVER

called as a witness by the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

#### Direct Examination (Continued)

By Mr. Mortenson:

Q. Now, Mr. Hover, you have described to some extent how the accordion wall was situated between the Pavilion Room and the main room. Would you give us a little more detail about its structure?

A. Well, it was a permanent wall which is about three feet high and in the center of the permanent wall were two [65] doors and above that, up to—not the ceiling, but up to what we call the “fin,”

(Testimony of Herbert D. Hover.)

which is a decorative feature in the lounge, there was an accordion wall. On each of the accordion—on the accordion wall which faced the Pavilion Room we had a three-ply curtain which was drawn and that was part of the decorative effect of the Pavilion Room.

The Court: You say this was constructed in 1948 or 1949?

The Witness: No, sir; 1952.

The Court: Are there any architects' plans still available to show the layout and construction?

Mr. Mortenson: Mr. McHale and I looked at some here a couple of days ago but there were some changes made after that—after that plan was drawn up. I think I have it here, but it is quite an elaborate thing.

Mr. McHale: I think Mr. Hover could identify the changes.

The Court: If you think it will only complicate it instead of clarifying it that is up to you.

Mr. McHale: I think it would be a help. I don't think there is too much difference.

Mr. Mortenson: I have a thought in connection with this. Could we have it marked for identification and then perhaps have some other plans stipulated to base on it?

The Court: All right.

Mr. McHale: At this time it might be appropriate—this complete report that I spoke of this morning I have had photostated [66] so I could place it in evidence in lieu of the original and as

(Testimony of Herbert D. Hover.)

a part of it, as one of the pages, there is a sketch, admittedly not drawn to scale, but it is a sketch showing the layout.

The Court: All right.

Mr. Mortenson: If your Honor please, would you ask Government counsel to provide me with a copy?

The Court: He is doing that now.

Mr. McHale: I have a complete copy and it also includes the part that you put in evidence this morning, since it is all part of the same report.

The Clerk: Plaintiff's Exhibit 8 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 8 for identification.)

Mr. McHale: And this is Exhibit 6.

The Court: Do you want to mark it 6-A?

Mr. McHale: Yes, 6-A.

The Clerk: It is marked Plaintiff's Exhibit 6-A instead of Exhibit 8.

(The exhibit referred to was marked Plaintiff's Exhibit 6-A and received in evidence.)

The Court: Would it help you if I give this to you?

The Witness: Yes, your Honor.

The Court: Can you point to the Pavilion Room?

The Witness: Right here. [67]

The Court: This is your main room here to the left?

(Testimony of Herbert D. Hover.)

The Witness: Yes, sir; right up to here. There is the orchestra and the dance floor and the tables around here. This is the lounge.

The Court: Where do you enter?

The Witness: It is referred to as the foyer.

The Court: You enter here?

The Witness: Yes. This is the lounge and you go into the main room. In going to the Pavilion Room we enter here where there are some steps.

Mr. McHale: You are referring to the outdoor entrance?

The Witness: Yes, sir.

The Court: There is also an entrance through the main lobby, is that it?

The Witness: Yes, sir. Since this sketch was made we have opened a little hallway here where you can go from the foyer through the main hallway into the Pavilion Room and also from the men's room out here. And then there is—out here you go down this corridor which is what the waiters used.

Mr. McHale: This is a door?

The Witness: No; this is blocked off.

The Court: What is this room here?

The Witness: This is all part of the Pavilion Room.

The Court: What is this line of demarcation there?

Mr. McHale: This is an old wall that was removed. [68]

The Witness: Yes, sir.

(Testimony of Herbert D. Hover.)

Mr. McHale: And this would be where the accordion curtain is now?

The Witness: Right here.

Mr. McHale: And the double door would be in the center, is that correct?

The Witness: That is right, right here.

Q. (By Mr. Mortenson): That is a single door, is it not? A. I think it is double.

The Court: Let me ask you this: Where is the dance floor in the Pavilion Room?

The Witness: Right here. And there is your orchestra stand right here. There was a window here. The orchestra would be here and the dance floor is oval in shape like this and normally I face this way.

The Court: And the men's room over here. Is that a common men's room for both rooms?

The Witness: Yes, sir; from here and also from here.

The Court: Where is the ladies room?

The Witness: That is right here.

The Court: And that is a common ladies room, too?

The Witness: Yes, sir.

The Court: And where is the kitchen?

The Witness: The kitchen is here. [69]

The Court: Which serves all the rooms, is that right?

The Witness: Yes; the kitchen serves all the rooms in the entire building, both buildings.

The Court: All right, thank you.



(Testimony of Herbert D. Hover.)

Q. (By Mr. Mortenson): Mr. Hover, at show time did you on occasions move the accordion wall back? A. Yes, sir.

Q. Now, with the elevation of the Pavilion Room about how far back could the patrons in the Pavilion Room view a floor show down in the main room?

A. Well, I would say about 12 to 15 feet. In other words, about two tables back—two tables back might be 15 feet or 12 feet.

Q. With regard to the 304 private parties which have been listed in the Plaintiff's Exhibit 2, and you estimate the proportion of the patrons who stayed for the floor show after the moving of the accordion wall had been pulled back?

A. I would say in about 50 per cent of the cases—I would say in about—after the wall was pushed back only about 20 per cent of the cases and about 50 per cent of the cases nobody stayed to see the show, and approximately 50 per cent of these dinner parties—where anyone did stay, it varied anywhere from perhaps 2 or 3 per cent up to about 95 per cent and I guess a rough average would be approximately 50 per cent. [70]

The Court: You would say in about 50 per cent of the cases 50 per cent of the people stayed?

The Witness: At an average, sir. It might be very close.

The Court: You are not including the 20 per cent where the walls were pushed back?

The Witness: No. I say in about 20 per cent—about one case out of five we pushed the walls back.

(Testimony of Herbert D. Hover.)

The Court: So everybody would stay?

The Witness: No, sir.

The Court: How many would stay?

The Witness: Well, it might vary anywhere—in those instances it might vary from 33 to 95 per cent. There were always some people who left and many people could not see the show at all. That was about 20 per cent of the case, but in about 50 per cent of the cases people did stay for the show by coming into the lounge or part of the main room, where there was no cover charge. They could do that the same as people from the street could come in.

The Court: In 20 per cent of the cases the walls were pushed back and from one-third to 90 per cent or 95 per cent they would sit there and watch the show?

The Witness: Yes.

The Court: That leaves 80 per cent of the cases that you have to account for? [71]

The Witness: Yes, sir.

The Court: And of the 80 per cent 40 per cent would leave?

The Witness: No, sir. I would say of the 80 per cent five-eighths of the total nobody would stay and of the three-eighths—that is 30 per cent of the cases, some of the people would stay and some would leave.

Q. (By Mr. Mortenson): Now, when this percentage of people who stayed moved into the main room what was your practice with regard to charging cabaret tax and paying it over to the Government?

(Testimony of Herbert D. Hover.)

A. We charged cabaret tax and we paid it to the Government in all those instances.

The Court: Will you read the answer?

(Answer read.)

The Court: You didn't charge or pay a cabaret tax on the 20 per cent of the cases where you moved the wall back, did you?

Mr. Mortenson: No, no, your Honor. I think this question was intended to refer to the situation where the wall was not moved back but where the patrons from the private party walked into the main room.

The Court: There is no issue on that because there they would buy their drinks or whatever they were getting right in the main room. [72]

Mr. Mortenson: I wanted that to be clear. We have no problem in connection with that.

The Court: Yes.

Mr. Mortenson: But the members of the private parties who did stay and went into the main room or into the lounge, they were charged 20 per cent tax and that tax was paid over to the Government. The Government does not assert otherwise.

Q. (By Mr. Mortenson): Now, were there some groups that you can recall which never stayed for the floor show? A. Yes, there are.

Q. Did those groups come once or more than once?

A. Well, they were normally groups that would meet periodically like professional fraternities, like

(Testimony of Herbert D. Hover.)

a medical fraternity. Well, they might have 100 there and maybe of that 100, maybe none in some instances and in other instances two or three of the physicians would meet their wives after dinner in which case they would pay the federal tax on whatever was consumed in the main room.

Q. These individual members would then go into the main room and be treated like anybody else?

A. Yes, except that most times none of them walked in but occasionally some doctor would meet his wife in the lounge and he would stay there for a while.

Then there was a group of accountants and they would meet periodically. And one of the apparel guilds has been [73] meeting there for eight years and they would usually have speeches. At most all of these cases they would have speeches, professional meetings, business meetings.

Q. Now, with regard to the Ciroette Room, just briefly describe how you would go from the Ciroette Room on the second floor into the main room.

A. You mean from the main room to the Ciroette Room?

Q. Yes.

A. There was a door that you had to open and then walk down a flight of, I think 17 steps, and at the base of it you turned right. There was a fire door there and you walked through there and you were in the main room.

Q. Is there an alleyway that must be crossed

(Testimony of Herbert D. Hover.)

from a door downstairs to a door into the main room?

A. Well, as you reach the bottom of the stairs, if you turn left, there is sort of a fire door and alley which takes you outside. If you turn right you go into the main room.

Q. Now, in general without being specific, were the banquet facilities and the method of handling banquets in the Ciroette Room the same as in the Pavilion Room?

A. I would say substantially the same, yes.

Q. Were there differences in prices between the banquets in the Ciroette Room and those in the Pavilion Room?

A. Well, there was a slight difference. The prices of [74] food in the Ciroette Room were slightly less than in the Pavilion Room.

Q. And what about toilet facilities and checking facilities in the Ciroette Room? Were they separate or the same as those downstairs?

A. Well, we had a checkroom there—we had a men's and ladies' checkroom. We had something that corresponded to a checkroom and then a ladies' rest-room and men's room there.

Q. Now, with regard to what we have designated here as the "closed house parties," did you have agreements with the representatives of the parties similar to the ones which have been entered in evidence here?

A. I don't think I have seen any agreements referring to closed house parties.



(Testimony of Herbert D. Hover.)

Q. Well, I was asking you whether you did have any.      A. Yes, sir.

Q. You had them?      A. Yes, sir.

Q. Now, in general what kind of arrangements were made as to these 20 closed house parties that have been assessed for cabaret tax in this case?

A. Well, there would be a stipulation as to the number of people, the menu, the price; a stipulation as to the tip, what time they would come in and sometimes there was reference [75] to entertainment. In some of these instances——

Q. How was the matter of the orchestra, if any, handled and how was the entertainment handled in most of these cases?

A. In most of the cases they provided—if they had entertainment they provided their own entertainment and music.

Sometimes they would take the show which was playing at *Ciro's*, or part of the show, and they would supplement it with their own acts. And in that case they would pay the people that had been working for us separately—that is, the money would not come through us. It would be paid directly to them.

In other words, if we had, for example, a name band or orchestra and if some of the people knew that band and wanted to make their own deal with that band and paid him separately—he worked for them and not for us on that particular night, but they specify the hours that he is to work—he works on a different scale of salary—a banquet scale—

(Testimony of Herbert D. Hover.)

they have a different number of men. In other words, he might have six men for them and play with us with 10 men or vice versa and whereas he worked for us four hours he might work five hours for them or any different arrangement.

He might start off with three men and supplement the band until he had eight men later on in the evening. Every deal was on its own, but they had full control of whatever [76] they wanted to do—whatever show they wanted. If they wanted a show or if they didn't want a show or wanted music or didn't want music, it was entirely up to them. Whatever they wanted they did it.

Q. Now, I used an illustration in my opening statement which I don't know was factually correct or not.

Suppose you had engaged Pearl Bailey for two weeks and somebody wanted a closed house party while Pearl Bailey had a two weeks' engagement with you—suppose it was right in between, what would happen there?

A. Well, if the closed house party was booked before we hired Pearl Bailey we would except that night from her contract and—let us say normally the contract would have been for two weeks, from September 1st to September 14th. The contract would stipulate that she would work her opening night, September 1st, but if the private party was on September 7 that she would not work on September 7 and would close on the 15th instead of the 14th

(Testimony of Herbert D. Hover.)

so that she would actually work 14 days out of the 15 days.

If the closed house was booked before we had signed Pearl Bailey, if the closed house was signed—was booked after we had signed Pearl Bailey the contracts had a clause that the management reserves the right to lay her off one day during that two week period and add that day onto the [77] end of the two weeks so you will get 14 out of 15 days and then we had a right to lay her off that one day.

In some instances an act wouldn't agree to that so in that case we had to pay the act even though they didn't work that night. But we had stock clauses in all of our contracts giving us the right on a two-week engagement to lay the act off one day and add the day on at the end of the engagement.

The Court: The question was what would happen if the engagement came during her two week period and she was the performer for the private party.

The Witness: In that case, if they wanted Pearl Bailey, they would pay Pearl Bailey.

The Court: What would happen is you wouldn't pay her?

The Witness: Not for that night.

The Court: Don't you have a contract with her for 14 days?

The Witness: Yes, sir.

The Court: What would happen on that one night?

The Witness: They would pay her for that one night.

(Testimony of Herbert D. Hover.)

The Court: In other words, they would pay her what you should have paid her—in other words, *pro rata*?

The Witness: Sometimes *pro rata* and sometimes less, depending on the day of the week. In other words, one night is more valuable than another. [78]

Q. (By Mr. Mortenson): Now, how were the arrangements carried out with regard to the closed house feature of the—strike that.

The Court: Let me ask you this. What would be the essential difference then on a closed house situation between a night when you opened it to the public and a night when the party had taken over the main room if you furnished the same entertainment and the same band?

The Witness: What would be the difference?

The Court: Yes, what would be the difference?

The Witness: Well, in one case the room is open to the public and in the other case it is not. In the other case it was a stipulated menu, it was a signed contract. Everything was on the tab. They could have whatever they wanted in the one case—no cover charge, but in the other case many of the tables have to pay a cover charge.

The Court: Perhaps I misled you with my question. What I wanted to get at, as far as the furnishing of the entertainment is concerned, would there be a difference?

The Witness: Yes.

The Court: What is the difference?

The Witness: Well, to begin with we took the

(Testimony of Herbert D. Hover.)

attitude that the people taking a closed house can do anything they wish.

Now, if they wanted to hire the act that was playing for [79] us at that time they had a right to do so because sometimes it was the only name act in town. They can have that act but instead of the act going on at a quarter of 11:00 and 1:00 o'clock as the act would normally do. Also they would have other acts in the show and the act probably would do a completely different show inasmuch as he or she did only one show that night. They might do a completely different show and the organization would pay for that act directly. In other words, when that act had a night off we didn't care whether the act worked or not.

The Court: You confuse me when you use the word "night off," I am talking about booking on a night when that act was supposed to work and the renting of the main room. Did you consider that a night off for the act?

The Witness: In most cases, yes.

The Court: You would consider that a night off for the act?

The Witness: In most cases I would.

The Court: I am assuming there is a two-week contract for the act and they are supposed to work every single night for two weeks and you have the medical association, let us say, renting the main room with your show for that night and your act and they don't import other acts—they want it as is. Now, in a situation like that, and I assume you



(Testimony of Herbert D. Hover.)

have had situations like that, is that correct? [80]

The Witness: Very few, sir. Maybe one or two occasions.

The Court: What course do most of them take?

The Witness: They bring their own show in.

The Court: Is that the usual thing?

The Witness: Sometimes they don't have a show at all. Other times they bring in their own and at other times will hire that act and supplement it with other acts of their own or with speeches or other embellishments. And sometimes a member of the organization would have a friend—maybe one would be Danny Thomas or Frank Sinatra or somebody like that who would have them go in the show and ad lib with the regular act.

Every party is on its own and we had no control over the show or the party. But we are assuming something, sir, which is a little bit contrary to what I tried to say and that is that in practice in every instance we had the right to lay the act off for that particular night because we had stipulated in advance of signing the act or, because the contract carried a clause we had a right to lay the act off for that particular night.

Q. (By Mr. Mortenson): As I understand you, when you say it was "night off" for the closed house party, that was one of the 15 nights provided for in the standard contract, is that correct?

A. Yes. [81]

The Court: He said when they signed them for

(Testimony of Herbert D. Hover.)

two weeks he had a right to ask them to take one night off and take the other night at the end of the two-week period, so there would be actually 15 days.

The Witness: Another way it would happen: sometimes we had an act for two weeks and they had not agreed to the clause. And during the time they opened we may have booked a private party and then when the act opens we will go to the actor and say we have a private party here on Sunday, "Would you be good enough to take that night off and we will add a day? You can take Sunday off," and in some cases they would agree. In one case the Hearst organization went to an act and asked them to do that and they said "Yes" and they said, "If you don't pay me for that night I will never work for you again as long as I live."

The Court: Is *Ciro's* operating now?

The Witness: Yes, sir.

Q. (By Mr. Mortenson): Actually, what we are talking about now is the 20 occasions from April 6, 1952, through March 27, 1955, or a matter of 20 parties in a period of three years, is that correct?

A. Yes, sir.

Q. And most of those parties were held on what day of the week?

A. Well, I can't tell from here but I would guess that [82] many of them were held on a Sunday night.

Q. Prior to the audit by Mr. O'Connor and Mr. Ross resulting in this assessment, had you been audited by treasury agents?

(Testimony of Herbert D. Hover.)

A. Yes, sir, we had been.

Q. Were the treasury agents familiar with the type of operation you had, for example, the closed house and the Pavilion Room operation?

A. They were thoroughly familiar—they knew everything we did and they agreed to what we did and——

Mr. McHale: I object to this question as immaterial and irrelevant and I move the answer be stricken.

The Court: I don't think it is material. It will be stricken.

Q. (By Mr. Mortenson): With regard to the closed house parties generally, who was at the door to take care of the patrons who were coming in and to exclude the public?

A. Well, we excluded the public. The parking attendants were told not to accept any cars from the public unless they stated they were coming in to this private party. And if anyone did get through, and there was also a big sign outside, I would say six feet by four feet saying "Sold out, please go to the Mocambo," which is a competitor close by.

Now, if they disregarded that sign and got through [83] the parking lot attendant, which happened very seldom, I was always at the door myself—the head waiter and myself were at the door, but I was always at the door myself and we did not let anybody in. We stopped them at the foyer—the door leading into the foyer, or if they got into the foyer

(Testimony of Herbert D. Hover.)

we stopped them at that time and told them they were not permitted to come in.

Q. Now, will you tell us whether anybody from the public was permitted to join any of these closed—so-called closed house parties?

A. Was anyone of the public permitted, is that your question?

Q. Yes. A. The answer is no.

Q. That is all I have, your Honor. I finished sooner than I thought.

The Court: All right. Well, I have asked for a car at 3:00 o'clock. I suppose you are all ready to go now, aren't you? Or do you want to start your cross-examination?

Mr. McHale: I thought it would be better probably to go out there now.

The Court: How long do you expect to be on cross-examination?

Mr. McHale: I think probably an hour or two—I am not sure. [84]

The Court: All right. We will recess from the courtroom to the premises that are in issue, *Ciro's* restaurant, and we will reconvene there.

I take it you can leave now and as soon as my car comes I will leave and meet you at *Ciro's* restaurant.

As I understand, you have arranged transportation for yourselves and the reporter.

Mr. Mortenson: Yes, your Honor.

(Whereupon, at 2:35 o'clock p.m. the parties indicated proceeded to *Ciro's* restaurant in Los

(Testimony of Herbert D. Hover.)

Angeles, whereupon the following proceedings were had:)

The Court: Let the record show that counsel and the court and the witness Hover have adjourned to Ciro's restaurant, together with the official reports, and that we are now inspecting the premises.

Now, what is this?

Mr. Mortenson: The Pavilion Room.

The Court: In the lounge the patrons always pay the 20 per cent tax?

The Witness: When the music is on.

The Court: From that point on, is that correct?

The Witness: No, about 30 minutes before.

The Court: Gentlemen, would you like to describe in your own words what you have seen here?

Mr. McHale: One thing should be clarified and that is [85] that since the period involved in this suit there have been some changes. I think Mr. Hover can probably tell us precisely what they are. But I believe this lattice work screen—that is of rather recent vintage—or shutters.

The Court: You mean between the lounge and the main room?

Mr. McHale: Yes.

The Court: How long has that been there, Mr. Hover?

The Witness: That was put up in May of 1956. Before then we had curtains. You see there is a track there where we had curtains.

Mr. Mortenson: I think we can see the curtain tracks are still there.



(Testimony of Herbert D. Hover.)

Now, what kind of curtains were they?

The Witness: Well, they were heavy curtains..

The Court: Which could be drawn back.

The Witness: When the show was on they were opened and normally when we opened the room, the curtains were closed.

Mr. McHale: When the show was on the curtains were open all the way across?

The Witness: Yes, sir.

Mr. McHale: With complete visibility?

The Witness: Except the curtains took a certain amount of space.

Mr. McHale: Even the patrons at the bar could see the [86] show.

The Witness: You say the bar or lounge?

Mr. McHale: I mean the bar lounge.

The Witness: Yes, I would say they could except when the show was on sometimes the show is on the right side of the room. You see there is a stage over there on the right side of the room. You see those little bannisters there. That is removable and that is a stage that is elevated. That is a special event—sometimes we did the show up there.

Mr. McHale: And in addition in the lounge there have been a lot of new tables or chairs put in here, haven't there—in the lounge area, that weren't in existence during the period?

The Witness: Some of these we put in. That is a new table there—four new tables and by "new" I mean dating back to 1956.

(Testimony of Herbert D. Hover.)

Q. (By Mr. McHale): You didn't have all these booths in here at the time, did you?

A. No, sir.

The Court: How many more booths did you put in here?

The Witness: Well, there are four booths here sir.

Mr. McHale: And the ones in the middle—did you have them in the middle at that time?

The Witness: Well, they are new. I am trying to recall [87] what we had there. I know we had chairs and tables there at one time. We had a sort of what we call a banquet space in that room and we moved that and put these booths in, but I think it was a period of time when we didn't have anything there—just chairs and tables.

The Court: This mens room over here. Was that available only for those in the Pavilion Room?

The Witness: Yes, sir.

Mr. McHale: No—that connects with both rooms, does it not?

The Witness: This is available only—I think the judge pointed over here. No one else was permitted in this room.

The Court: Is that a common mens room?

The Witness: Common mens room.

The Court: Two entrances?

The Witness: Yes.

Mr. Mortenson: That is the one he described as having an entrance at two different levels.

The Court: And there is a ladies room we

(Testimony of Herbert D. Hover.)

haven't seen, I take it. We will get to it in a moment, which is also used commonly between the Pavilion Room and the main room?

The Witness: Yes, sir.

The Court: All right, gentlemen. Do you want to describe [88] your observations and I can join in.

Mr. Mortenson: We note there are three steps from the main room up to the lounge, one step in approximately the middle of the lounge and two steps from the lounge up to the Pavilion Room. That is from the upper portion of the lounge. That makes a difference of six steps from the main room to the Pavilion Room.

The lower wall separating the lounge from the Pavilion Room is approximately three and a half feet high, eight inches thick with a double door approximately in the center of the wall.

The Court: Also about three and a half feet high.

Mr. Mortenson: The accordion walls——

The Court: What would you say is the height between the floor and the ceiling here?

Mr. Mortenson: Approximately five feet.

The Court: From the floor?

Mr. Mortenson: From the floor to the ceiling?

The Court: Yes.

Mr. Mortenson: Approximately eight feet.

The Court: So that the accordion walls make up the difference between the permanent three and a half foot wall and the ceiling?

Mr. Mortenson: That is correct. And the accordion walls move back to the north and south walls

(Testimony of Herbert D. Hover.)

within approximately [89] five feet of the north and south walls.

The accordion walls are manually operated.

On the Pavilion Room side are heavy curtains made of three-ply fabric which close completely on a traverse rod.

Mr. Hover, would you show us how the cloth curtain pulls across?

The Court: I don't think it is necessary to show how it pulls across.

Mr. Mortenson: I guess we will all agree that the cloth curtain and the accordion wall draw back—you are at liberty to call it what you want, Mr. McHale.

Now, at the east end of the room is a bar at which presently there are four stools. The bar will hold approximately eight stools.

In the lounge at the north end is a bar which is large enough to accommodate about ten stools, ten patrons sitting down.

There is a separate entrance to the Pavilion Room leading from the street, the doors facing south. There is a door to the mens room on the north side of the Pavilion Room.

Before we get to the rest shall we look at the ladies room arrangement?

Mr. McHale: I would like to state for the record that the opening—— [90]

The Court: Wait a minute. I am going to give you an opportunity to describe it as you see it and then I may want to make some observations of my own.

(Testimony of Herbert D. Hover.)

Within our immediate vision this is all you see now that you care to describe for the record?

Mr. Mortenson: Except for an oval dance floor which has an approximate diameter of 13 feet by 16 feet in the center of the Pavilion Room.

South of the dance floor there is a grand piano up against the wall in an alcove. That is all I have here.

The Court: Do you want to say anything, Mr. McHale?

Mr. McHale: Yes, your Honor. I would say this. I think the solid walls separating the Pavilion Room from the lounge is closer to two and a half to three feet in height; that the sliding curtain when pushed all the way back opens to within approximately three feet of the side of the Pavilion Room on either side, leaving the entire center of the Pavilion Room open.

The Court: Will you approximate what that portion is that is open? The reporter suggested 24 feet. Would you agree, gentlemen, that when the accordion wall and the door and the curtains are open there are about 24 feet of clear vision?

Mr. Mortenson: I stepped off 24 feet.

The Court: Would you agree it is 24 feet? [91]

Mr. Mortenson: Yes.

Mr. McHale: I got 25 feet.

The Court: All right.

Mr. McHale: I would say that the difference in height between the seating level of the Pavilion Room and the dance floor of the main lounge is



(Testimony of Herbert D. Hover.)

such that the person sitting in the Pavilion Room would have clear visibility over the heads of the people seated intermediately in the lounge and main dining room.

Mr. Mortenson: And let the record show that Mr. McHale is sitting approximately where the sliding wall is.

Mr. McHale: The stage of the main dining room and the dance floor, I would say, is visible from most parts of the Pavilion Room except the back corners near the bar and the very extreme left and right side near the curtain.

I would say this for the record. It is my understanding that the furnishings and booths and so forth in here now are not those that were here at the time involved. I believe that is true, isn't it, Mr. Hover?

The Witness: Yes, it is, but the room itself is the same.

Mr. Mortenson: May I ask whether the legs on the chairs are the same length as they were?

The Witness: Yes, sir.

Mr. McHale: That is all, your Honor. [92]

The Court: I want to ask Mr. Hover a question. Is this Pavilion Room used on occasions for an overflow of the patrons of the other rooms?

The Witness: Yes, sir.

The Court: You just draw back the curtains and the accordion walls?

The Witness: No, sir; we always—we have another curtain here which, incidentally, is placed

(Testimony of Herbert D. Hover.)

where there are supports on each wall and where we had a very large attraction then we would draw this curtain and we could incorporate this portion of the Pavilion Room into the main room, but we would never go further than about here.

The Court: Mr. Hover has indicated that the front portion or the western portion of the Pavilion Room itself, approximately 20 feet of it, has been used on occasions to form a contiguous room with the lounge and the main room to handle overflow patronage with the curtains drawn back.

My observation also is that the lounge is contiguous with the Pavilion Room, lowered two steps and that the lounge is contiguous with the main floor lowered three steps.

Mr. Mortenson: And your Honor, if you will note, strangely enough, about the center of the lounge is another step.

Mr. McHale: I don't know whether I mentioned the width of the opening. It is approximately five feet between the [93] lounge and Pavilion Room.

The Court: All right, gentlemen. Now let us see the ladies' room from the outside. It has already been indicated there is a separate entrance from the outside to the Pavilion Room.

I also observe that there is a separate entrance into the Pavilion Room through the main foyer which serves as an entrance also to the lounge and to the Pavilion Room.

There is also a common ladies' room as there is a men's room for use for the two rooms.

(Testimony of Herbert D. Hover.)

All right, let us see the Ciroette Room.

The Witness: There is a separate checkroom here.

Mr. Mortenson: May we also note that there is a separate checkroom. There is a checkroom opposite the door leading into the Pavilion Room.

The Court: And also a checkroom, I take it, which the Pavilion Room people can use in the main foyer.

The Witness: Yes, sir.

Mr. McHale: There are also some loudspeakers in here, Mr. Hover. Now, whether they are in the same place as they were then I don't know.

The Court: I couldn't say.

Mr. McHale: There were speakers in the room?

The Witness: Yes, sir.

Mr. Mortenson: Now, I wonder if Mr. Hover could explain [94] the structure of this building in terms of the different levels?

The Court: That you can do from the witness stand tomorrow. You don't have to do that here because that is apparent.

Mr. Mortenson: We could look at if it has something to do with the basement.

The Court: All right, let us see the Ciroette Room.

Mr. Mortenson: We are now in the Ciroette Room. There is a window facing—there is a window on the north end—am I correct? That is north, is it not?

The Witness: Yes, sir.

(Testimony of Herbert D. Hover.)

Mr. Mortenson: And two exits on the west, one on one level of the Ciroette Room and a second level to the south.

The Court: I think that portion of it is really not important. I think what you should dictate for the record is your observation that there is ingress and egress down to the main room.

Mr. Mortenson: Yes, your Honor, that is true.

Mr. McHale: There isn't too much in the Ciroette Room.

The Court: No, there isn't.

Mr. McHale: I mean they are only taking five per cent from this room.

The Court: Are you going to present the five per cent part? [95]

Mr. McHale: Yes.

The Court: At any rate let me say this. My observation is that the Ciroette Room is located one flight up of approximately 13 steps.

The Witness: 17.

The Court: 17 steps to reach the Ciroette Room and you enter into a sort of bar and dance floor and then you climb another five or six steps in order to get into the dining portion of the Ciroette Room.

The Ciroette Room does not have any vision into the main room or the lounge and is, as I have said, one flight above it.

In order to enter into the main room you descend this flight of steps and go through a double door into the main room.

How do you get into this room? Do you go through the main foyer?

(Testimony of Herbert D. Hover.)

The Witness: You can go through the foyer or sometimes through another corridor which takes you outside.

The Court: But ordinarily it is through the foyer and through the lounge?

The Witness: Yes, sir.

The Court: And then upstairs?

The Witness: There are 14 steps.

The Court: 14? [96]

The Witness: Yes, sir.

The Court: Through the foyer and lounge and up here and they use the common check room downstairs.

The Witness: Well, we have something here which can serve as a checkroom. We have some hooks here but sometimes they will use the common checkroom.

The Court: Does anybody else have anything for the record?

Mr. McHale: You might mention there is a dance floor here.

The Court: I mentioned that.

Mr. Mortenson: There are separate toilets, separate toilet facilities for men and women here.

The Court: Unless somebody else has something to say we will recess court until 10:00 o'clock tomorrow morning.

(Whereupon at 4:00 o'clock p.m. a recess was taken until 10:00 o'clock a.m., Friday, December 20, 1957.) [97]



Friday, December 20, 1957—10:00 A.M.

The Court: You may proceed.

The Clerk: 20853, Herbert D. Hover vs. United States of America for further court trial.

Mr. Mortenson: Ready for the plaintiff, your Honor.

Mr. McHale: Ready for the United States.

The Court: You may proceed. I am waiting, gentlemen.

Mr. McHale: Very well, your Honor. I believe I am starting my cross-examination now.

The Court: Yes. Mr. Hover, will you take the stand, please?

### HERBERT D. HOVER

the plaintiff herein, called as a witness in his own behalf, having been previously sworn, resumed the stand and testified further as follows:

### Cross-Examination

By Mr. McHale:

Q. Mr. Hover, you stated you have been in business here——

Mr. Mortenson: Before Mr. McHale starts his cross-examination could I ask one question on a matter that may have been a little confusing? [100]

The Court: Go ahead.

Mr. Mortenson: I think I asked some questions and you did too, your Honor, about the Pavilion Room and the witness, I think, understood that I was asking about the distance back at which you

(Testimony of Herbert D. Hover.)

could observe the floor show. I believe he said something like 16 feet. I am not sure, but he wasn't at that time testifying about the length of the room itself which, of course, shows on the diagram as being much greater than that.

I just wanted to ask whether there was any confusion in the court's mind as to what his testimony was.

The Court: Well, I have now viewed the premises and there is no confusion in my mind.

I think that anybody sitting in the Pavilion Room, quite frankly, could see the floor show if he wanted to.

If they drew the curtain then they couldn't see the floor show, but the curtain was only drawn for the overflow crowds from the lounge and main room. But if the Pavilion Room private party had the accordion doors open anybody could see it if he wanted to see it. He might have to stand or strain his neck, but if a person was in the front part—16 feet or whatever it was Mr. Hover said, you could see it with greater convenience than you could in the rear, but I think as far as I am concerned the record should be clear that anybody could view it from the Pavilion Room with the [101] accordion doors open if they wanted to.

Mr. Mortenson: Provided they stood up in the back part. I sat in the back and I couldn't see the stand myself.

The Court: Frankly there are many main rooms where it is difficult for a patron to see a performer.

(Testimony of Herbert D. Hover.)

It would be more difficult to see the show from the rear I will admit, but it could be seen.

Mr. Mortenson: I have no further questions. Has the original deposition been filed? Well, I assume that since we have the witness here it isn't necessary to file the deposition.

Mr. McHale: I would like to have it filed. Do you have it?

The Court: Yes, I have the original. Why do you want it filed?

Mr. McHale: I simply want it available.

The Court: Hand this to counsel.

Mr. Mortenson: He has a copy of it.

The Court: You want to use it for purposes of impeachment?

Mr. McHale: Yes.

Mr. Mortenson: I just didn't see the point in filing the deposition.

Mr. McHale: Just so we have the original available.

Mr. Mortenson: Yes. And it is signed. There are five [102] typographical errors—well, some five minor corrections. Aside from that it is signed and notarized.

Q. (By Mr. McHale): Mr. Hover, you testified yesterday regarding the Pavilion Room. I would like to know first of all what the basis of your testimony is as to the number of people who stayed to see the floor show of the Pavilion Room parties. Now, as I understand it, there were at least 304 parties during that period.

(Testimony of Herbert D. Hover.)

Do you have any records that would show you or would indicate how many people in those parties stayed to see the main room floor show?

A. No, sir, we do not.

Q. Then I suppose your answer would be that you have no records that would show what people went home before the floor show started?

A. Only my own observation and what I recall.

Q. But you have no records?

A. We never were required to keep records, counselor. The Treasury Department knew what we were doing. They okayed it. We were not required to keep records. We kept records of everything we were required to keep.

Mr. McHale: I move to strike the answer of the witness.

The Court: I will let it stand.

Mr. McHale: The records that you have of the sales in [103] the Pavilion Room are broken down, are they not, into sales of food and sales of beverages, is that correct? A. Yes, sir.

Q. Except for the total for each evening is there any other record of those sales that you can tell from what time any of the sales were made or the time when drinks were dispensed from your present records? A. Yes, sir.

Q. You can? A. Yes, sir.

Q. What do you have so you can tell that?

A. Well, we can tell from 10:30 on when the price of things changed.

(Testimony of Herbert D. Hover.)

We know that all drinks that were charged at 90 cents started at 9:30.

Q. Well, did you in your bookkeeping records enter in a different column or in some way that you could tell the number of drinks that were sold at 90 cents and the number sold at 75 cents? Is there some way you can distinguish that?

A. Yes, from the tapes of the register.

Q. You have the tapes?

A. I believe we do. I haven't seen them but I believe we do.

Q. Have you looked for them? [104]

A. No, sir, I have not but we keep our records for the required period of time. I am sure we have them.

Q. Where would they be—at the restaurant?

A. Yes, sir.

Q. You wouldn't have any records that would indicate the number of people who were present at these Pavilion Room parties, who either left before the show started or stayed afterwards, and similarly I suppose you would have no records to show when the people left—I mean you wouldn't be able to tell from the records you have at what time the people actually left, whether it was 11:30 or 12:00 or 12:30 or 1:00 o'clock?

A. No, sir, we do not.

Q. Do you have any records by which you can tell with respect to any evening in this period in which the Pavilion Room was open, how late the bartender stayed on duty in the Pavilion Room?

A. No, sir, we do not.



(Testimony of Herbert D. Hover.)

The Court: Can you tell me how you arrived at the figure of 90 cents for drinks at 10:30 instead of 75? Why exactly a 15 cent boost? Was there a particular reason for that, Mr. Hover?

The Witness: Well, originally we used to charge 75 cents for what we called bar brands and 90 cents for de luxe brands and when it was necessary to increase—to make a [105] change we kept it at 90 cents. It was much easier for the customer instead of making it 85 or 95 cents.

Now why we made it at 10:30, sir, this goes back——

The Court: You explained that in your direct examination. You said it was because of the extra bartender.

The Witness: We took the same figure as we charged for de luxe brands. In other words, it made it a less complicated contract. It was easier for a man booking a party to absorb certain costs.

The Court: The reason I asked the question, quite candidly, is because the Government suggests in its brief that the boost from 75 cents to 90 cents is exactly 20 per cent.

The Witness: There may have been, sir. It goes back many years. I don't know, sir. That may have been it initially—why it was done.

The Court: All right, you may continue.

Mr. McHale: Will you mark this please, Mr. Clerk?

The Clerk: Defendant's Exhibit A marked for identification.

(Testimony of Herbert D. Hover.)

(The exhibit referred to was marked Defendant's Exhibit A for identification.)

Mr. McHale: I offer at this time as Defendant's Exhibit A, your Honor, a summary of the Ciroette Room records, which is similar to that—I mean based on the same principle as [106] Exhibit 2, Plaintiff's Exhibit 2.

Mr. Mortenson: No objection.

The Court: Received.

(The exhibit referred to, marked Defendant's Exhibit A, was received in evidence.)

Mr. McHale: Would the clerk hand the exhibit to Mr. Hover, please?

(Document handed to the witness.)

Mr. McHale: And would the clerk hand Exhibit 2 to Mr. Hover, please?

(Document handed to the witness.)

Q. (By Mr. McHale): Mr. Hover, you testified yesterday that one of the reasons you raised the drink prices at show time was the necessity of keeping an extra bartender on duty in the Pavilion Room.

Now, wouldn't the same principle be applicable to the Ciroette Room?

A. Not necessarily. It may be. It all depends on the circumstances, but not necessarily. One would not necessarily follow from the other.

Q. Well, did you keep a bartender in the Ciroette

(Testimony of Herbert D. Hover.)

Room? You had a bar up there. You had a bartender up there, is that correct?

A. At certain times. Maybe for an hour or half hour or all night. Pardon me. I didn't understand your question. [107] Do you mean do we keep a bartender there all night whenever there was a party?

Q. Yes.

A. The answer to that would be no, not all night sir.

Q. Well, at what time would you pull the bartender out of the Ciroette Room?

A. That would depend upon the requirements of each individual party. Some parties required no bartenders. Some parties said: "We will drink only for a half hour, from 5:30 until 6:00." And some said: "We want him there all night."

Sometimes we didn't keep a man there all night even though requested for all night because it was economically not feasible to do so.

Q. There were parties in the Ciroette Room when the bartender was kept all night, is that correct?

A. I don't know. There may have been. There may have been. I don't know.

Q. Well, I invite your attention to Defendant's Exhibit A, the summary regarding the Pavilion Room. You will notice there is a column headed "Cost Per Person" of the drink on the right-hand side?

A. Yes, sir.

Q. Do you find that column?

A. On Exhibit A that applies to the Ciroette Room. [108]

(Testimony of Herbert D. Hover.)

Q. Explain the column.

A. You will note the drink price almost without exception is 75 cents.

Q. Yes.

A. Whereas the Pavilion Room is 75 cents and 90 cents most of the time.

Q. Yes.

A. Except for the very beginning. What is the question?

Q. How do you explain the fact—how do you explain your reasoning in saying that you needed an increase in price in the Pavilion Room in order to have a bartender when you never needed an increase in price to have a bartender in the Ciroette Room?

A. Well, the parties in the Ciroette Room were invariably much smaller than the parties in the Pavilion Room and usually it was necessary to have a bartender there for a very limited time. We would double the bartender from downstairs.

The parties in the Pavilion Room were the larger parties and there may have been more requirement for a bartender. But speaking generally, there is no general rule. Each party is handled on its own, basically, except the parties in the Ciroette Room were smaller and the price of the same food was even lower in the Ciroette Room than [109] in the Pavilion Room.

The Court: I think the question is, why would the price go to 90 cents if you didn't supply an additional bartender which, I think you gave as the

(Testimony of Herbert D. Hover.)

reason why you had to boost the prices to 90 cents. That was because you had to put a bartender on for all night.

The Witness: Yes.

The Court: Why would you increase the price when you didn't put a bartender on?

The Witness: I don't think I understand that, sir. Why we would increase the price?

The Court: If anyone stayed after 10:30—

The Witness: If anyone stayed after 10:30 we would have to have a bartender there all night.

The Court: In every instance you put a bartender in the room if they stayed after 10:30?

The Witness: Yes, sir, because we couldn't double a man from the front bar—the service bar in the Pavilion Room if they stayed after 10:30.

The Court: Could you use that lounge bar there which is so close to the Pavilion Room?

The Witness: No, sir.

The Court: Why?

The Witness: That was open to the public. The Pavilion Room was not open to the public. There were two different [110] operations. One was a closed house and the other was open to the public. But as I said before this goes back many years. I think that was it—why we did it.

I couldn't testify truthfully now why we made certain decisions in 1951—six years ago.

Q. (By Mr. McHale): It is true, is it not, Mr. Hover, with respect to the Pavilion Room, that the increase in price was invariably 20 per cent or from



(Testimony of Herbert D. Hover.)

75 cents to 90 cents?           A. Yes, sir.

Q. It never varied?           A. Yes, sir.

Mr. Mortenson: May I call to the court's attention a mathematical error that is being committed here.

If a drink is 90 cents, 20 per cent of that is 18 cents according to my computation.

The Court: If the drink is 75 cents and you boost it to 90 cents that is a 20 per cent boost.

Mr. Mortenson: But that isn't the way it works. If you have a drink that sells for 90 cents you pay a cabaret tax on that of 18 cents.

The Court: We are not talking about that. Just a moment. Hear me out. If a drink sells for 75 cents and it goes to 90 cents that is a 20 per cent boost.

Mr. Mortenson: Yes, but it has nothing—— [111]

The Court: That is the point they make. That is the point they make as I take it.

Now, I am not ready to agree with it but the inference they want me to draw is that they boosted it exactly 20 per cent. I understand the point you make.

Mr. Mortenson: Well, if they were going to absorb 20 per cent more cabaret tax they would have to make it 95 cents because then it would be 76 cents left.

The Court: All right.

Mr. McHale: That is a matter of argument.

Mr. Mortenson: I think it is a matter of mathematics.

Q. (By Mr. McHale): With respect to the bar

(Testimony of Herbert D. Hover.)

in the Pavillion Room, that was a profitable operation, wasn't it, Mr. Hover?

A. Well, do you mean that single operation? I don't quite understand your question.

Q. What I mean to say is, you made a bigger profit out of the sale of the drinks than you did out of the sale of food, didn't you?

A. I can't answer that categorically. It would seem the answer would be yes. I don't wish to be caustic about it, but sometimes you didn't—sometimes you made more on food. It all depends on how many drinks you serve.

Q. Over the long run, in the general run of this period involved, wasn't it pretty cheap an investment to [112] put a bartender in the Pavillion Room to sell those drinks to those people you have got in there at these private parties?

A. It all depended. We had other costs involved. I would normally—I might say yes—I might say yes but there are many exceptions to it.

Q. Now, you previously testified that you have no records that would show you what number of people stayed for any particular party to witness the entertainment.

Now, we know that during this period there were at least 304 parties. We know that you have folders for those 304 parties. That is the basis on which Exhibit 2 was made up.

Now, are there any of those 304 parties at which you specifically say that nobody stayed?

A. Yes, sir.

(Testimony of Herbert D. Hover.)

Q. All right. Will you please tell us which parties they are by referring to Exhibit 2? And I am talking about the Pavilion Room.

A. Pavilion Room?

Q. Yes, that is Exhibit 2.

A. I do not recognize any by name, sir.

Q. All right. Are there any of those parties where you say that any specific percentage stayed or didn't stay or went home before the floor show started?

A. I cannot say, sir. [113]

Q. Are there any of those specific parties in which you can say the curtain was not drawn—that is, the group did not see the floor show?

A. You are talking about specific parties?

Q. Yes. A. No, sir; I cannot say.

Q. We have here in the courtroom, Mr. Hover, your files, folders regarding these parties. They are available here if you wish to refresh your recollection. Would they help you any?

A. No, sir; those contracts are written before the parties, weren't they?

Q. Yes.

A. Those contracts have no bearing of what occurred on the night of the party—that is, whether the curtain was drawn.

Q. Would you not be able to refresh your recollection?

A. There is nothing there to refresh. I will look at the folders if you wish me to.

Q. Tell me, Mr. Hover, what other regular employees you had with you during most of this pe-

(Testimony of Herbert D. Hover.)

riod—I mean—I don't mean other employees, but what employees did you have during this period?

A. Well, we had——

Q. In one capacity or another—the major ones. I [114] don't mean the bus boys and waiters.

A. In the office we had a manager.

Q. Well, let us forget about the office. The office people would only be there in the daytime?

A. Yes, sir.

Q. Pretty much?                      A. Yes, sir.

Q. List the people who would be there during the hours of operation in the evening when these Pavilion Room parties were going on.

A. Well, basically the kitchen help, dining room help, musicians and show and the concessionaires.

Q. What individuals were there pretty regularly throughout the period?

A. You mean in the dining room crew?

Q. Yes. I mean, for instance, you must have had a headwaiter and orchestra leader?

A. Yes, sir.

Q. Can you name the major individuals in your staff?                      A. We had a headwaiter.

Q. What was his name?                      A. John Oldrate.

Q. He was there during this period?

A. The major portion of it, yes, sir.

Q. Who else? [115]

A. Well, I am trying to get the question. Do you mean on the music or only in the dining room crew?

Q. I mean people who would be around, who

(Testimony of Herbert D. Hover.)

would know what is going on in the Pavilion Room besides yourself?

A. Well, the headwaiter may know.

Q. And that was Oldrate? A. Yes.

Q. Who else?

A. Some of the waiters may know.

Q. Are they still around?

A. Well, the crew has changed pretty much. One or two men may be around.

Q. Who else would know—how about bartenders? Are they pretty regular?

A. Well, we have one bartender now. I don't know whether he worked there during that period or not. He probably did. He probably did. I know he came and left. Bartenders will come and go. I don't know.

Q. What is his name? A. Sammercelli.

Q. And you had one or two, of course, orchestra leaders that were there most of the time, didn't you? A. Yes, sir.

Q. Who were they?

A. Dick Stabile. [116]

Q. And who else?

A. Well, then, we have another band. It might have been—may have been Bobbie Ramos.

Q. These individuals you have named would be around there in the evening and would know what was going on, wouldn't they?

A. They would not. They would be around there in the evening but they wouldn't know what was going on in a party.



(Testimony of Herbert D. Hover.)

Q. But they would more or less see your operation—they would be there most of the time over a period of three or four years?

A. That depends on what you mean by “see our operation.” They wouldn’t know what went on.

Q. They were there regularly six or seven nights a week throughout this period?

A. I am trying to give you an answer, sir. To tell you the truth an orchestra leader wouldn’t have any idea what goes on. He is only interested in music and hangs around backstage.

Q. You had another employee who was in charge of making arrangements for these parties?

A. Yes, sir.

Q. And her name was what?

A. Mrs. Miller. [117]

Q. Dolores Miller?

A. Dolores Miller, yes.

Q. I believe you testified on direct, did you not, that you were your own advertising man—you did your own drafting of ads?

A. Basically, I did, yes.

Q. These advertisements—Exhibits 4-A, 4-B and 4-C. You drafted or had a hand in laying those out, did you?

A. I would assume responsibility for that, sir; yes, sir.

Q. Well, when you put such phrases in those ads that your group will be able to see “our fabulous show at no extra cost” and so forth, what did you intend by that?

A. What I intended by it?

(Testimony of Herbert D. Hover.)

Q. Yes.

A. Well, I intended several things. You can come into the main room and see the show. You can also see the show from the Pavilion Room if you so wanted to.

Q. In other words, weren't you, Mr. Hover, offering to the patrons or people who would book the Pavilion Room as an inducement the right to see the floor show?

Mr. Mortenson: I object to the form of that question, your Honor, as to what was an inducement. That is a subjective matter that I don't believe has any place in a tax case. [118]

The Court: Objection overruled.

The Witness: May I have the question?

Mr. McHale: Will you read the question?

(Question read.)

The Witness: Well, I wouldn't necessarily say it was an inducement, but it was one of the features which—under some circumstances you could see the floorshow.

Q. (By Mr. McHale): Mr. Hover, the addition or the construction of the Pavilion Room was done under your period of ownership, was it not?

A. Yes, sir.

Q. It was your idea the building of the Pavilion Room, was it not?      A. Yes, sir.

Q. And this idea of having a low wall with an accordion curtain or folding wall, that was your idea, was it not?

(Testimony of Herbert D. Hover.)

A. Well, it was a result of conferences with an architect, but I would assume responsibility for that, sir.

Q. Mr. Hover, there were several occasions or many occasions, were there not, when you didn't have these, what you term "private parties" in the Pavilion Room and the Pavilion Room would be dark for that evening, but if you had a major attraction and the regular part of your main room and lounge would be booked solid, you would use part of the Pavilion Room as part of your main cabaret operation? [119]

A. We would try to do it, yes, the front portion.

Q. You used the front portion?

A. Yes, sir.

Q. And that happened many times, didn't it?

A. A number of times.

Q. On New Year's Eve it was a standard practice to use all of your Pavilion Room as part of your main operation?

A. No, sir.

Q. It wasn't?

A. No, sir.

Q. Did you usually have a separate party on New Year's Eve?

A. No, sir. We never went beyond two rows of tables.

Q. Then your testimony with respect to New Year's Eve would be the same as with respect to a major attraction?

A. If people would sit there we would—we would have difficulty seating people there but we never went beyond two rows of tables in that room.

(Testimony of Herbert D. Hover.)

Mr. McHale: At this time, your Honor, I would like to, if it is agreeable with counsel here, to break the cross-examination of Mr. Hover. I have some witnesses subpoenaed to testify about the Pavilion Room and if I could resume with Mr. Hover at a later time I would appreciate it. I would like to call these witnesses out of order as part of the Government's case. [120]

Mr. Mortenson: I have no objection.

The Court: I would prefer that you finish the cross-examination.

Mr. McHale: All right. This is my thought, your Honor. One of the features of the case is a closed house. That is completely different—not completely but it is considerably different than the Pavilion Room in itself. Most of the rest of my cross-examination will be based on the closed house arrangement.

The Court: How about the Ciroette Room? Do you have any further cross-examination on that?

Mr. McHale: Yes, a couple of matters with reference to the Ciroette Room.

Q. (By Mr. McHale): Mr. Hover, it was your practice—we have stipulated that five per cent of the receipts of the Ciroette Room represented people who were taken down to see the floor show from the Ciroette Room. In other words, we realize you couldn't see the floor show or hear the orchestra up in the Ciroette Room, but five per cent were taken down to see it.

Now, my question is did you make any charge

(Testimony of Herbert D. Hover.)

for that, any additional charge like a cover charge or admission charge for that?

A. You mean the people that went down from the Citroette Room downstairs? [121]

Q. That is right.

A. I would say there may have been some instances there was a cover charge. It would depend upon where they sat. If they sat in the no cover charge part of the room then there was no cover charge.

Q. I understand your normal practice was to put them in the back of the lounge or the first two rows of the Pavilion Room. Did you make a charge there?

A. If they consumed anything we did.

Q. Did you charge them, not for their food and drink, but a special charge for bringing them down—an admission or cover charge?

A. There was no cover charge or admission charge where they sat.

Q. You made no additional charge for that privilege?

A. If they sat where we charged a cover charge they paid. If there was no cover charge there was no payment.

You can walk in off of the street. It is the cheapest place in town. You can walk in off the street and not spend a dime. Anybody can do that. And if anybody sat there in a no cover charge place they didn't pay anything. There never was any admission.



(Testimony of Herbert D. Hover.)

They had a right to do the same as anyone else in the United States. But if they sat in a cover charge part of the room they were charged a cover charge. [122]

Q. We understand that. Now, with respect to the Pavilion Room. You made no extra charge or additional charge for the people to sit in the Pavilion Room when you opened the sliding curtain so they could see the floor show?

A. No, sir, we did not—no, no extra charge.

Mr. McHale: That will be all at this time, your Honor, on that phase of the case. He is your witness, Mr. Mortenson.

The Court: Just a moment. May I see those ads, please?

(Documents handed to the court.)

The Court: When you had this phrase in your advertisement: "Arrangements can be made for your group to see our fabulous floor shows and dancing at no extra cost," you were holding out to the public the fact that they could see the show and dance without paying the 20 per cent tax, isn't that in effect what you were doing?

The Witness: No, sir. We did one of two things——

The Court: Go ahead.

The Witness: You could have your party in the main room and pay a tax, which happened very often, or if you held your party in the Pavilion Room—if you had a private party from 6:00 until 10:00 it was possible to see the show.

(Testimony of Herbert D. Hover.)

That was a ruling we had from the Treasury Department. They checked our contracts. They knew what we were doing. We were aboveboard in every instance. We conformed 100 per cent with what the men in the Treasury Department permitted [123] us to do. And we had no right to deprive any man because, if he wanted a private party in the Pavilion Room, to deprive him of the same rights another man had who walked in off of the street to sit down in a lounge in a certain part of the room and see the show. We had definite rulings on that.

The Court: Just a moment. A man who came in from the outside and had a drink at the bar or the lounge didn't pay any cover charge, is that correct?

The Witness: Ordinarily he didn't. Or he can sit in certain parts of the room and there is no cover charge.

The Court: What happened to a man who came in, let us say at 10:30, when the show went on and sat in the lounge, just had a drink there and watched the show and didn't pay any charge?

The Witness: He didn't have to have a drink. We didn't even solicit drinks.

The Court: Do you mean to tell me——

The Witness: We didn't do any of those things. That is why we went broke. I wish we had now.

The Court: You mean you invited the public in to watch that show without having a drink?

The Witness: Sir, on your average you will sell two drinks to a person anyway and it is seldom you

(Testimony of Herbert D. Hover.)

will get four people in who will sit all night without having drinks. The bartenders complained that the bar was cluttered up with [124] people who didn't buy a drink at all.

The best attraction we ever had was Johnny Ray, who is married to my competitor's daughter. He played at Ciro's because he knew when he came into Ciro's he didn't have to spend five cents. Nobody bothered him. And he said, "If I ever become famous I will stay with Ciro's."

He married my competitor's daughter and we came out ahead in the long run. We never solicited any drinks. It is the cheapest place in town.

Whatever we did, we did not feel that we had a right to penalize anybody because they attended a private party and in a private room—we did not feel we had a right to penalize them and withdraw certain privileges from them that were open to everyone—to every member of the public.

We openly advertised it. The Treasury Department knew about it. The revenue agents checked it. They attended parties. Everything was done open and aboveboard and whatever taxes we had to collect we collected and we paid it. It was difficult at times but we paid it.

The Court: All right, go ahead.

Mr. Mortenson: Shall I save my redirect examination?

The Court: Suit yourself. Maybe you ought to do it on this point.

(Testimony of Herbert D. Hover.)

Mr. Mortenson: I just have a couple of questions with regard to this matter of cover charge and sales of liquor [125] during the show time.

### Redirect Examination

By Mr. Mortenson:

Q. Did you have any special arrangements with groups like the Arthur Murray dance studio, for instance?

A. We had many arrangements, yes. If you are referring specifically to the Arthur Murray group, they would come in. There would be no cover charge. They were guaranteed like two drinks per person or sometimes chicken a la king—a cheap deal as far as we were concerned, but it helped fill the room and we were glad to have those deals and we solicited those deals and some of this advertising was used to solicit those deals, yes, sir.

Mr. Mortenson: That is all I have.

### Recross-Examination

By Mr. McHale:

Q. Mr. Hover, you have no written rules from the Treasury Department on your cabaret?

A. The Treasury Department will not give you a written ruling. If they did it wouldn't even be effective. I wish they had given me a written ruling and I wish they were bound by it because all my problems would be over. They had rules. They audited our books. They said we were doing [126]

(Testimony of Herbert D. Hover.)

okay. We advertised openly. We did nothing underhand.

The Court: May I suggest your problem wouldn't be over because you would still have the problem of the free drinks given out at the bar.

The Witness: Free drinks?

The Court: I should say the people who came in and don't drink at all which you said was a problem.

The Witness: We averaged two drinks per person.

Mr. Mortenson: They are freeloaders—they are different.

The Witness: And you have your tourists and they don't drink at all.

The Court: All right, go ahead.

The Witness: We also did—we were respected the same as any place in the United States in the enforcement of the cabaret tax. I studied this thing in Las Vegas and New York and Chicago and Florida and Washington. We enforced the cabaret tax stricter than any place in the United States, including places within throwing distance of Ciro's and we had nothing but complaints because people thought we were discriminating—they thought we were keeping the cabaret tax.

I wish to God Ciro's was permitted to operate the same as every other place in the United States is permitted to operate. [127]

Mr. McHale: I move to strike that.

The Witness: It is true, sir, it is true.



The Court: You are going to be excused for the time being.

Mr. McHale: I would like to call Mr. Johnson out of order, if I may.

Mr. Mortenson: Certainly.

### VINCENT JOHNSON

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Vincent Johnson.

### Direct Examination

By Mr. McHale:

Q. What is your occupation, Mr. Johnson?

A. I am office manager for a building contractor.

Q. And in 1954 were you a member of a group that arranged a party at Ciro's restaurant?

A. Yes.

Q. What was the name of that group?

A. Called the "Engineers-Constructors Society."

Q. And were you the person who made the arrangements for the party? [128] A. Yes.

Q. And was the party held in the Pavilion Room? A. Yes.

Q. And how did you go about arranging it? Did you get in touch with Ciro's by telephone?

A. All the arrangements were made by telephone, yes, sir.

(Testimony of Vincent Johnson.)

Q. Made by telephone. Did you speak to Mr.——

A. To Dolores Miller.

Q. Mrs. Miller was the person who negotiated the party?      A. Yes.

Q. You arranged for a party on February 26, 1954, is that correct?      A. That is right.

Q. In the Pavilion Room?      A. Yes, sir.

Q. And do you have any correspondence or contracts or anything that you entered into with Ciro's?

A. Yes, sir; I have a copy of the agreement.

Q. Did you bring it with you?      A. Yes.

Q. May I see it, please?

Mr. McHale: Will you mark this for identification, please?

The Court: Are you going to offer it? [129]

Mr. McHale: Yes.

The Court: Show it to Mr. Mortenson and maybe it can go right into evidence.

(Document handed to Mr. Mortenson.)

Mr. McHale: I offer the February 11, 1954, letter as our next exhibit in order, your Honor.

Mr. Mortenson: No objection.

The Clerk: Defendant's Exhibit B in evidence.

(The exhibit referred to, marked Defendant's Exhibit B, was received in evidence.)

Q. (By Mr. McHale): You were the one who was given the duty of arranging this party for your group, is that correct?

A. That is correct.

(Testimony of Vincent Johnson.)

Q. Did you consider other establishments before you finally decided upon *Ciro's*? A. Yes, sir.

Q. What others?

A. Well, I recall we checked with the *Biltmore Bowl* and I believe the restaurant on *Sunset Boulevard* there just east of *Vine Street*. I can't recall the name right now.

Q. And was this a party arranged for—was it a mixed group—men and women? A. Yes.

Q. And what arrangements were made with *Mrs. Miller* with respect to dancing or music or anything of that sort— [130] a floor show?

A. Yes. We were told that we would have our own private room; that we would have our own private bar, our own dance floor and that the music would be furnished from the main stage but it would be wired to the room.

Q. And what were the arrangements with respect to your group seeing the floor show?

A. We were told that at floor show time the curtain would be drawn and we could see the show.

Q. And was that done? A. Yes.

Q. And did your group see the show?

A. Yes, sir.

Q. And what percentage of your group saw the show, would you say?

A. I would say 100 per cent.

The Court: How large was the group?

The Witness: Roughly 85 persons.

Q. (By Mr. McHale): And how long did the party continue?

(Testimony of Vincent Johnson.)

A. I believe the majority of the people were there until midnight.

Q. And was there a bartender in the Pavilion Room?      A. Yes, sir.

Q. During that period?      A. Yes, sir. [131]

Q. You will notice in this letter of February 11—do you have it in front of you?      A. Yes.

Q. There is a paragraph stating in substance that the bar will be open and that drinks will be charged for at the rate of 75 cents per drink until show time at 10:30 and 90 cents per drink thereafter.

Was a reason given to you for that increase in price?      A. None that I remember, no.

Q. You don't remember any particular reason?

A. No.

Q. Did you understand that there was a reason for it?

A. Well, I believe everyone assumed that there was the matter of taxation there.

Mr. Mortenson: Pardon me. May I ask that that be stricken, your Honor?

The Court: Yes.

Q. (By Mr. McHale): Was the opportunity to see—what was the floor show at Ciro's?

A. It was the opening night of the Julius La-Rosa show.

Q. Was the opportunity to see the floor show one of the reasons that you selected Ciro's?

A. Yes.

Q. It was an inducement?      A. Yes. [132]

(Testimony of Vincent Johnson.)

Q. When the floor show went on what did the people in your group do to see the show? Did they remain seated at the tables?

A. No. They rearranged their seating somewhat to get as close to the curtain as possible.

Q. Did people in your group go down and dance on the main room dance floor?

A. Yes; I believe a few did.

Mr. McHale: That is all, Mr. Johnson. Your witness.

### Cross-Examination

By Mr. Mortenson:

Q. Mr. Johnson, did you enjoy the show?

A. Very much.

Q. When you called the Biltmore did you ask about a private room?

A. No, sir; we didn't.

Q. Did you have any discussion with the person you talked to at the Biltmore about a cabaret tax?

A. No, sir.

Q. You didn't?            A. I don't recall.

Mr. Mortenson: That is all.

The Court: Step down. Would you prefer to take a recess at this point? [133]

Mr. McHale: I think it would be a good opportunity.

The Court: All right, we will have a short recess.

(Short recess.)



The Court: You may proceed.

Mr. McHale: Mr. Frederick Payne.

FREDERICK PAYNE

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Frederick Payne.

Direct Examination

By Mr. McHale:

Q. During 1952 what was your occupation, Mr. Payne?

A. I was assistant manager of the Security-First National Bank in Santa Monica.

Q. And did you arrange for a party—for some group at *Ciro's* restaurant? A. Yes.

Q. And what was that group?

A. It was the employees of the Security-First National Bank, 14th and Wilshire in Santa Monica.

Q. And do you have any papers or documents or anything with respect to that? [134]

A. No; I don't have a thing in my possession.

Mr. McHale: I offer *Ciro's* correspondence file regarding this party.

The Clerk: Defendant's Exhibit C for identification.

(The exhibit referred to was marked Defendant's Exhibit C for identification.)

Q. (By Mr. McHale): In that file, Mr. Payne, there is a letter addressed to Fred Payne, dated

(Testimony of Frederick Payne.)

March 14, 1952, and at the foot it is marked "Accepted" and "Approved." Is that your signature?

A. Yes.

Q. That is the contract or arrangement you entered into with Ciro's, is that correct?

A. Right.

Q. With whom did you deal in arranging this party? A. Mrs. Miller.

Q. At Ciro's? A. At Ciro's.

Q. And did you consider other places, restaurants or night clubs or hotels?

A. Yes, sir. Prior to the time we decided on having our party here we talked to the Miramar Hotel in Santa Monica, the Riviera Country Club and I believe also the Santa Ynez Inn in Santa Monica.

Q. But eventually you decided on Ciro's? [135]

Q. And your group—what kind of group was it? Was it a mixed group, men and women?

A. That is right, husbands and wives.

Q. And the date of the party was April 19, 1952, is that correct? A. Yes.

Q. Do you remember what the attraction was on that night—what the floor show was?

A. No; I frankly do not remember.

Q. You don't recall that? A. No.

Q. Your group did see the floor show, is that correct? A. Yes.

Q. When you made this arrangement for the party at Ciro's was it stated that your group would have the opportunity to see the floor show?

(Testimony of Frederick Payne.)

A. Yes; that the accordion wall would be drawn so that we would be able to see the show.

Q. And your party was in what we call the Pavilion Room?      A. Yes, sir.

Q. How many people were in your group?

A. Between 55 and 60.

Q. And was there a bartender and bar in that room?      A. Yes, sir. [136]

Q. How late was the bar kept open?

A. Well, to the best of my memory I would say about midnight. That is about when the majority of the people left.

Q. And the floor show went on at about 10:30?

A. 10:30.

Q. And the accordion curtains were open at show time so the party could see the floor show?

A. That is right.

Q. And what percentage of the people would you say in your group stayed to see that floor show?

A. Almost 100 per cent.

Q. Was the ability to see the regular Ciro's floor show the reason or the inducement for your group to have its party there?

Mr. Mortenson: I object to the question, your Honor. It calls for a subjective state of mind.

The Court: Well, I will sustain that objection. I think we have had the question pretty much answered by Mr. Hover himself.

Q. (By Mr. McHale): Did some members of your party go into the main room and dance in the main room?

(Testimony of Frederick Payne.)

A. I believe that a few may have.

Q. About what time did the party break up?

A. I would say about midnight.

Mr. McHale: Your witness. [137]

Mr. Mortenson: No cross-examination.

The Court: Step down.

I want to pose this hypothetical question once more to make sure that I am clear on this. It is not to be taken as an indication of any way in which I am going in this case because at this point I frankly do not know. But in the event that I were to find that it is a private party until 10:30 and then becomes a public performance at 10:30 what am I going to do about amounts? Now, that is what worries me. How am I going to apportion this.

Mr. McHale: First of all, your Honor, of course we consider the fact that the law is—that the statute, I think, is quite clear, that the entire amount paid during the evening for any person who is entitled to be there present during the entertainment period is taxable.

The Court: And suppose I don't agree with that?

Mr. McHale: If you don't agree then I think we have a problem in that respect.

The Court: We haven't seen these tapes Mr. Hover talked about. I think we are going to have a great deal of difficulty as to time—what time the payments were made.

Mr. McHale: If your Honor is going to depend on the timing, we have the bar going all evening.

We have the meal completed ordinarily at 10:00 o'clock or so. If such a thing as the mechanics of paying the check is important that [138] would be rather difficult. I do not think that is a good basis upon which to decide a case but——

The Court: I don't necessarily mean the time of paying the check. I quite agree with you there. Is there some way of apportioning the amounts paid for the entire evening?

Mr. Mortenson: Yes, your Honor, there is. There is available records—we think they are available. In the Pavilion bar there is a cash register. Each cash register has its own number so that you can identify a tape taken from a register.

Now, at a point on this register instead of a 75 cent item or a dollar and a half item you will find a 90 cent item or a dollar and eighty cent item and so on. That will determine the hour, 10:30 as we have been talking about here.

The Court: No; you still don't get my point. I understand that, and that is all right. If you want to use the tape that is all right with me but I think you should compile a summary of it because I don't think I should start going through this tape looking for these figures.

But do either of you desire to comment on this, and that is an allocation to be made based upon the number of hours ordinarily consumed by a private party, let us say from 7:00 to 12:00 o'clock, and let us say it cost \$5 from 7:00 to 12:00 for a dinner. Would there be an hour and a half that would carry a tax? Do you understand my question? [139]



Mr. McHale: You mean to take the total receipts from the Pavilion Room and divide them by hours?

Mr. Mortenson: Mr. Hover says that is unrealistic. I think everyone in this room is sufficiently sophisticated to know that drinks are generally had mainly before dinner, for one thing, and very few after dinner comparatively.

The hourly basis would be unrealistic. But there is another thing that I don't think has been made clear here.

In the books there is a segregation of what is paid for food and what is paid for liquor. There is no problem about the sale of food after 10:30 so that is completely eliminated.

Then we have only the problem of allocating the charges for liquor after 10:30 and that can be done with exactitude if we have all the tapes because the only place the liquor was sold on which the 20 per cent was not collected and paid over was in the Pavilion Room. It can be done down to the exact dollar if all these tapes are available.

Now, if they are not available we could still come to a very close approximation——

The Court: Let me ask you something, Mr. McHale. Have you ever raised any point concerning the charges in the bar after 10:30? In short, have you ever raised the point that there should be a 20 per cent tax added to that?

Mr. McHale: You mean in the lounge?

The Court: Lounge. [140]

Mr. McHale: I think there has been some con-

fusion. I am going to bring—I thought I would bring Mr. Hover back—I am glad your Honor caught that. I think the evidence is clear that there is a tax on the lounge sales after show time and in fact before show time.

Mr. Mortenson: My understanding is——

Mr. McHale: That is the lounge is always taxable. I think there was some confusion there.

The Court: Always a 20 per cent tax?

Mr. McHale: A half hour before show time.

Mr. Mortenson: I think there is only one——

Mr. McHale: Dancing time—not the show time, so it is earlier than that.

The Court: Is it your contention there is a 20 per cent tax put on the bar checks or lounge checks?

Mr. McHale: Yes, your Honor.

Mr. Mortenson: Well, this is my understanding. Very few people came in early to *Ciro's*, say at 6:00 o'clock, and the 94 per cent has taken care of that. The six per cent was the non-taxed charges early in the evening.

The Court: That is in the main room.

Mr. Mortenson: The lounge as well as the main room—the main room and the lounge.

The Court: I asked a simple question, if you have the answer and, of course, I want it by testimony. [141]

A man walks into the lounge at 9:00 o'clock and he has some drinks and he doesn't eat and he stays on and he drinks at the bar. Is there a 20 per cent tax on that?

Mr. Mortenson: Yes, sir, and there has been no dispute over that so far as I know.

The Court: Well, then, why shouldn't there be—again don't take by the form of my question that I am urging that there should be—why shouldn't there be at least the same reasoning applied to the Pavilion Room, which is just adjacent to the lounge when you open up those curtains?

Mr. Mortenson: Well, the issue has never been raised because the assessment wasn't set up that way.

The Court: In other words—

Mr. Mortenson: Maybe I should have done it, but I didn't. I took the issues the way they were set up here and, of course, my contention was that it was a private party from beginning to end so I didn't have to cut it off. I am going to now, however, find some way of doing that. But my position was that it was a private party from beginning to end and taxable at no time.

The Court: You see I want to get away as much as possible from labels.

Now, the mere labeling of a private party is not decisive of the issue. You have to go to basic things.

Now, from my observation of the operation of the place, [142] the layout of the place, you have a lounge which is immediately contiguous to this Pavilion Room, so much so that it almost forms one room when you open up those curtains. And what I am concerned with is this, that here is a lounge where 20 per cent tax is placed upon the check. The theory, and it never was contested by the taxpayer,

the theory being that this is a public performance for profit which these patrons are witnessing.

Mr. Mortenson: That is right.

The Court: Now, let us forget the label for a moment. Is there any difference between what the lounge customers are seeing and what the Pavilion customers are seeing when you open the curtain?

Mr. Mortenson: No difference except, of course——

The Court: Then in order to be consistent should you not be urging that there should not be a 20 per cent tax placed on the lounge customers?

Mr. Mortenson: No.

The Court: Why? Forget the label.

Mr. Mortenson: I will forget the label and stick with the basic facts.

We go back to the public performance. Now, the Sigma Chi are having a party with nobody in the party but Sigma Chis and their wives.

The Court: Yes. [143]

Mr. Mortenson: I say that isn't public. It certainly isn't public at the beginning and it isn't public at the time the curtain goes up.

Now, as I tried to point out in my last brief, it seems to me that the Government has confused this matter of what is public with what is private by then saying this: When the curtain opens up the mere fact that the Sigma Chis can look across a room wherein there are people——

The Court: Not only that but can walk down and mingle with them and dance with them on the floor.

Mr. Mortenson: That, of course, makes it difficult, I will admit, because then there is an intermingling. And to that extent my argument isn't so strong, but does that contaminate the entire party—does that make the Sigma Chi party a public party when they sit there and have been there all evening—I am speaking of those who don't go down and dance.

The Court: Well, the query is: Doesn't it make the public, when the management says, "Now, you can come on down here—this is a privilege we are extending to you," is there any difference between that and the Sigma Chis taking a part of the main room, let us say, and the other part of the room being open to the public? Actually what is the difference?

Mr. Mortenson: Then we get into the eternal thing that [144] troubles lawyers and judges: When do you have a change of species or when do you just have different colors? When do degrees create new situations? And you can extend that, I think, to a point where you would say, "Well, sure, it is all public. You open the wall and people mill around back and forth and so it is all a public place."

The Court: Isn't that what the management intends? Doesn't the management intend and hold that out to them and say, "Here, you can be private and as private as you want to be, but remember you can also be public and we can help you be public and we can open these curtains and give you the facilities of the place and mingle with everybody."



Mr. Mortenson: But the public doesn't come in with the Sigma Chis.

The Court: Nobody is going to throw them out if they want to come in there just because the curtains are open from that point on, and from that point on the privacy which the Sigma Chis wanted ceases.

Mr. Mortenson: Well, of course, I can't fail but to see the logic of your position.

The Court: I am not taking a position. I just wanted to throw it out to you because I do this frequently and if I am on the wrong tactie I want to be put on the right one.

Mr. Mortenson: But here is the viciousness of the whole thing. The Commissioner comes out with a regulation. [145] It has never been judicially examined but there it is. What does the regulation say? If anyone is entitled to be present at a public performance for profit in a cabaret the 20 per cent tax applies to all charges if he came in for breakfast——

The Court: Yes, I know that. That is troubling me.

Mr. Mortenson: So you stretch your logic on the other thing and what kind of result do you get? You get a perfectly ridiculous result.

The Court: All right, go ahead.

Mr. McHale: Mr. McGinley, will you take the stand?

## FRANCIS V. MCGINLEY

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Francis V. McGinley.

## Direct Examination

By Mr. McHale:

Q. Mr. McGinley, what is your occupation?

A. I am a welder engineer salesmanager.

Q. And in 1952 did you represent some group that made arrangements for a party at Ciro's?

A. Yes, I did. [146]

Q. And what was that group?

A. Kiwanis Club of Vernon and Southeast Los Angeles.

Q. And did you have any paper or letter or a memorandum by which you entered into a contract at that time with Ciro's?

A. We had a contract. I couldn't find it. However, I do have a copy of our bulletin and the check that I paid the bill with.

Mr. McHale: I offer as Government's next in order Ciro's file on the Vernon Kiwanis party of January 11, 1952.

The Clerk: Defendant's Exhibit D for identification.

(The exhibit referred to was marked Defendant's Exhibit D for identification.)

Mr. Mortenson: Your Honor, we haven't any objection if he wants to offer any further of these

(Testimony of Francis V. McGinley.)

except the folder. There are some doodles and other things on the folder.

The Court: Take out the doodles. We don't want any doodles in the record.

Mr. McHale: In this file there are several letters but particularly there is one on white copy paper dated January 2, 1952.

Q. (By Mr. McHale): Is that your signature?

A. Yes, sir.

Q. That is the agreement that you accepted and approved, is that correct? [147]

A. Yes, sir.

Q. With whom did you make the arrangements for the party, Mr. McGinley?

A. With Dolores Miller.

Q. This letter was dated January 7th, your party was for the 11th, just a few days following that. The party was to be held in what room?

A. In the Pavilion Room.

Q. That is the one with the sliding accordion curtain or wall?

A. That is right.

Q. Do you recall what attraction there was on the night you had your party?

A. Yes. It was one of my favorites, Les Paul and Mary Ford.

Q. Was it a mixed group?

A. Yes, it was.

Q. Husbands and wives?

A. Husbands and wives.

Q. How many in the party?

A. As I recall, there were about 112.

(Testimony of Francis V. McGinley.)

Q. Were arrangements made for dancing in the Pavilion Room?

A. Yes, we had a dance floor in the Pavilion Room laid down. [148]

Q. With music piped in?

A. That is right.

Q. Were arrangements made in advance? Did you arrange with Miss Miller that the accordion curtain would be open so your group could see the floor show? A. At 10:00 o'clock.

Q. And that was done? A. Yes.

Q. What percentage of your party stayed to see the floor show?

A. I believe most of them stayed.

Q. Was there a bartender at the bar in the Pavilion Room?

A. No, we don't drink at our meetings. We had a cocktail party ahead of it and we had a bartender just before that portion started. We didn't have a bartender after that.

The Court: I take it what was important to you and your members was the attraction that was appearing there, Les Paul and Mary Ford?

The Witness: Well, it was the price and the service, too, along with it. At that time it was pretty hard to get good food and a lot of favors. Of course it was an attraction, I feel, to go to Ciro's, and we did have the best food and the best service. [149]

Q. (By Mr. McHale): I understand at this party you made the arrangements for the dinner, is that correct?

(Testimony of Francis V. McGinley.)

A. Yes. I didn't intend to but some of them were a little slow paying so I paid the check.

Q. What time of the evening did you pay for the dinners?

A. As I recall, it was right after the show was over.

Q. After the show was over?

A. Yes, to Mr. Johnny Andrate.

Q. Mr. Andrate was the one you paid?

A. Yes.

Q. Have you brought the check with you?

A. Yes, sir, I have.

The Court: You paid the entire bill, I take it, after the show was over?

The Witness: Yes, sir.

The Court: What time did you leave that night?

The Witness: I left about whatever time the show was over. I would imagine about a quarter to 11:00.

Q. (By Mr. McHale): Would you say that the entire party departed after the show was over?

A. I would say that probably 90 per cent of them did. Some of them stayed and they went down and took tables and they were on their own from then. I paid only for the meals [150] and the drinks that anyone had were on their own.

Q. Some of the people went into the main room and danced, or went down to the lounge and sat, did they? A. Yes.

Mr. McHale: I offer the check as Government's Exhibit next in order, your Honor.



(Testimony of Francis V. McGinley.)

Mr. Mortenson: No objection.

The Clerk: Defendant's Exhibit E admitted in evidence.

(The exhibit referred to, marked Defendant's Exhibit E, was received in evidence.)

Q. (By Mr. McHale): Before you selected Ciro's you looked into the possibility of having a party at a number of other establishments?

A. Yes.

Q. What were they?

A. At the Biltmore, the Verdugo Club in Glendale, the Oakmont Country Club, and quite a few others.

Q. What was the particular reason why you chose Ciro's?

A. I think one of our other groups had had a party there earlier and they recommended it, plus the fact that the price was attractive, and I think Dolores Miller was a very fine saleslady, and we did have very good service. We had lots of waiters and we wanted to get our meeting on early and through and we were furnished lots of help there. [151]

Q. And the floor show? A. That is right.

Mr. McHale: That is all. Thank you.

Mr. Mortenson: No cross-examination.

The Court: You are excused.

(Witness excused.)

Mr. McHale: Mr. Westengard, please.

JAMES R. WESTENGARD

called as a witness by and on behalf of the defendant, being first sworn, was examined and testified as follows:

The Clerk: How do you spell your last name?

The Witness: W-e-s-t-e-n-g-a-r-d.

Direct Examination

By Mr. McHale:

Q. In January of 1953, Mr. Westengard, what organization did you work for?

A. I was with the Security-First National Bank.

Q. Did you organize a party at Ciro's restaurant?

A. Yes. That was for the Lion's Club, Rancho Park Lion's Club.

Q. With whom did you deal at the restaurant?

A. Miss Dolores Miller.

Q. Do you happen to have a copy of the contract or [152] letter?      A. No, I don't.

The Court: How many such witnesses are you going to call?

Mr. McHale: I have two more present in the courtroom. I had a total of nine at the Pavillion Room, some of which are on call.

Mr. Mortenson: I will stipulate that the further witnesses subpoenaed will testify substantially as these witnesses have testified.

The Court: Very well. Why couldn't we get that stipulation and then you can read their names and then a stipulation that if called they would so testify,

(Testimony of James R. Westengard.)

and you can frame your stipulation. You can frame it over the lunch time, if you want to.

Mr. Mortenson: I will go further than that, that whatever contracts are involved I will stipulate to those two.

The Court: All right. Wouldn't that be satisfactory?

Mr. McHale: I think it will be, your Honor. May I just check one contract? I want to be sure about one thing.

The Court: If there is something that is slightly different, that is another proposition, but if they are just going to testify to the arrangements made in advance and what happened after they got there, and the opportunity to see the show and the opportunity to dance, and if they are all the [154] same there is no necessity to repeat their testimony constantly if you can frame it in a stipulation.

Mr. McHale: May I just check one thing, your Honor?

The Court: You could do that over the lunch time. You don't have to do that right now.

Mr. McHale: There is one witness that I might want to call. I just want to check one thing that he might want to testify to.

The Court: Why don't we call that witness anyway.

Mr. McHale: I have forgotten which one it was. I am trying to find it in my papers. I discovered that this morning.

I would like to call Mr. Marvin Stevens.

(Testimony of James R. Westengard.)

The Court: Then I take it as to Mr. Westengard that we will have a stipulation after the lunch hour as to his testimony, is that correct?

Mr. McHale: Maybe we could stipulate now.

The Court: Go on.

Mr. McHale: That with the exception of Mr. Stevens, whom we are going to call now, that all the others, that the testimony that the other witnesses who have been subpoenaed——

The Court: Or will this pertain to the 304 contracts?

Mr. McHale: To the 304 contracts. [154]

Mr. Mortenson: Of course we have this situation, I don't think the agents have interviewed all of the 304. How selective they were in picking the ones they did interview, I don't know. I would assume they wouldn't take the ones they thought were the worst for the Government's side.

Now as far as arrangements and the character of the parties, there is no problem about a stipulation there. The only thing is I wouldn't want my stipulation to cover the percentages of people who stayed because up to now we have one testifying on 100 per cent and one to about 95 per cent, and one to something else. That is something of course that your Honor is going to decide anyway on the basis of all of the evidence and not just on this testimony.

What I am trying to do is shorten this so that we don't have purely cumulative evidence coming in.

The Court: If you are going to shorten it then it is going to have to be a stipulation that is going

(Testimony of James R. Westengard.)

to shorten it. If it is going to leave it open with many questions undecided in the stipulation which he could probably elicit by questioning, then you are going to have to go ahead with it.

I will ask you a couple of questions and see if we can get a stipulation on this from both sides.

No. 1: Are you ready, both sides, to stipulate that the Government was prepared to call—how many witnesses? [155]

Mr. McHale: We originally subpoenaed 10 but I was going to call as many as necessary to establish that most of the people stayed to see the floor show.

The Court: I see. What I was going to try to get at was that you were subpoenaing witnesses who would represent a cross section of the 304 parties. Do we have any agreement on that?

Mr. Mortenson: No, your Honor.

The Court: Then you go ahead and subpoena them.

Mr. McHale: I am willing to do this, your Honor——

The Court: If I am going to draw any inferences, which I take it you want me to draw, that these witnesses are typical of the parties that were run in that Pavilion Room, then I must have something before me from which I can draw that inference.

Mr. McHale: I am willing to do this, I offer this to counsel: May we take at random through this sheet 10 more, and I will go out and subpoena them.

The Court: I think maybe that is the way to do



(Testimony of James R. Westengard.)

it so then I would have some basis to say that these are spot selections and therefore would be typical. That is going to be something you perhaps would want to talk over.

Mr. Mortenson: We might have a practical problem, a time problem in finding them.

Mr. McHale: We can subpoena them for next Thursday [156] morning. I understand the court will still be here.

The Court: Yes. I think that you ought to work it out by stipulation if you can. I don't want to influence you, but in order to save time I think you ought to be ready to stipulate that this was typical.

Mr. Mortenson: I think we can get together on something. This matter of what is typical and what isn't is going to be pretty difficult with this many parties here.

The Court: I think it is pretty well established that there was a pattern, and I really think you ought to stop quibbling and we ought to be able to go to the main point, that there was a pattern, that these people came in, they rented the room at a certain hour, they could see the show if they wanted to see it, and if we are going to start now being concerned about how many people left and how many people stayed on, we are going to be sidetracked.

The main issue is, and I take it your client wants it adjudicated for future operations——

Mr. Mortenson: Not only my client but there are a lot of places looking at this. It is a very important issue.

(Testimony of James R. Westengard.)

The Court: —is what is the situation when a night club offers this type of facilities and then does certain things at a certain hour to permit these people to become spectators and to partake, not whether or not they actually, as I see it, did some leave, did some see it, how many stayed, but the real issue is, here it was, you can have it. Now what is the situation?

Don't you agree with me on that?

Mr. Mortenson: Yes, but unfortunately he has a regulation to deal with. We keep running into these problems all the time. Out of a great generosity of the Commissioner's heart, he says, "I can impose a tax from breakfast until 2:00 a.m., but——"

Mr. McHale: It is the Congress, not the Commissioner.

Mr. Mortenson: This is the Commissioner's ruling that I am talking about. It is his interpretation of what Congress said.

But there is a generous concession that they will not impose this tax if a patron left before the show. That is why this is important, because if there is taxability at all you can't apply it under the regulations that the Government concedes to those who left.

The Court: Yes, you are quite right.

Mr. Mortenson: So it shouldn't be a problem, but it is.

The Court: You are quite right about that.

Mr. McHale: We submit, your Honor, first of all

(Testimony of James R. Westengard.)

there is an assessment which is prima facie evidence and has a presumption of correctness and that, as your Honor knows, the basis was the same as taxing the people in the other [158] room, the 94 persons who stayed to see the show and six who left. It is my basic opinion that Mr. Hover's testimony is not entitled to too much credence as to the proportion of people who stayed. He has certainly an interest in the suit, and the basis for his opinion is not very clear.

The Court: I would be inclined to agree with that.

Mr. McHale: So I think the real issue of Mr. Mortenson's case is this private party business. I don't see why we can't agree that this is typical.

The Court: I think it is something you ought to sit down together and work out and not do here in open court.

Mr. Mortenson: Very well.

The Court: If you can.

Mr. Mortenson: I would like to talk with Mr. McHale at the noon recess, and it is quite possible that we could save time of the court and time of the witnesses.

The Court: That may very well be. Do you think maybe we ought to recess now?

Mr. McHale: I have got these witnesses here, your Honor. I hate to hold them up. Each one takes a little time.

The Court: I know. What do you want to do?

(Testimony of James R. Westengard.)

If you are going to get a stipulation then they are excused.

Mr. Mortenson: Why don't we stipulate to everything except how many went home and just put them on for that purpose? We will stipulate to the rest. [159]

Mr. McHale: In other words, the stipulation will be with respect to the remaining witnesses except Mr. Stevens, whom I am calling for another purpose, that the testimony of the witnesses who preceded is typical and the others would testify except with respect to the number of those who stayed.

The Court: I think the best thing, gentlemen, is for you take the luncheon recess and work out something on paper. I really do, instead of doing it in this haphazard way, because apparently it is of some importance to you and it is of some importance to you, and you have offered a previous stipulation in writing and I think you ought to do it on this subject also, work it out in writing if you can.

Mr. Mortenson: Mr. McHale knows what the people are going to testify to. We can discuss it and perhaps reach a stipulation.

The Court: All right. But I also am concerned about a stipulation dealing with the balance of the 304 parties.

Mr. Mortenson: Here is the problem, every one of these 304 filed his tax with the District Director, who has an office in this building. I am under a

(Testimony of James R. Westengard.)

handicap. If their memory isn't too clear I know which way it is going to swing. So I practically have to depend on Mr. Hover's testimony. The Government has 304 and he has all the agents that he needs. They can interview all 304 if they want to. [160]

The Court: Can't we get a stipulation?

Mr. McHale: I don't think that is fair, your Honor.

The Court: Just a moment. Can't we get a stipulation with respect to all of these others with the exception as to what time the people left?

Mr. Mortenson: Yes.

The Court: All right. We have gotten that far.

In other words, the testimony of these nine or ten who would have been called is typical of the testimony which would have been elicited of the remaining number of private parties, with the exception of the time when the people actually left.

Mr. Mortenson: Yes.

Well, the curtain, probably we have to the opening of the curtain, but for those things we have no problem.

The Court: We have no problem but the problem.

I have tried to help you shorten your case during this Christmas season, but if you don't want to do it, go ahead. I am here to try it.

Mr. Mortenson: I want to get together with Mr. McHale.

The Court: I am going to recess for lunch at



(Testimony of James R. Westengard.)

this point and you talk it over, gentlemen. If you need your witnesses, you will simply have to keep them. I am sorry.

They are all instructed to return at 2:00 o'clock, but in the meantime I do want you and Mr. Mortenson to [161] discuss this.

The Witness: Your Honor, I have a boat this afternoon that I thought I would get on. Could I just finish my testimony?

The Court: Take his testimony.

Q. (By Mr. McHale): If I understand, you did not bring any papers of this party?

A. No, I have no records.

Mr. McHale: I offer this as the Government's exhibit next in order.

The Clerk: Defendant's Exhibit F marked for identification.

(The exhibit referred to was marked Defendant's Exhibit F for identification.)

Mr. McHale: I offer it.

The Clerk: Admitted.

(The exhibit referred to, marked Defendant's Exhibit F, was received in evidence.)

Q. (By Mr. McHale): This letter of December 5, 1952, is a letter agreement with Ciro's and was signed by you? A. That is correct.

Q. You have been sitting in the courtroom while these other witnesses have testified regarding the arrangements [162] for the Pavilion Room, have you not? A. Yes.

(Testimony of James R. Westengard.)

Q. Would your testimony with respect to the questions asked be the same?      A. Yes.

Q. In every particular as the testimony of the other witnesses?      A. Yes, I would say so.

The Court: How many people would you say remained to see the floor show here?

The Witness: Practically a hundred per cent.

The Court: How many people were in the party?

The Witness: Around 70, 75.

The Court: Did some of them go on the floor and dance?

The Witness: I don't think so.

The Court: All right. Any cross-examination?

Mr. Mortenson: No cross-examination.

The Court: You may step down.

(Witness excused.)

Mr. McHale: Does your Honor wish to recess now?

The Court: Will you have an internal revenue agent testify here?

Mr. McHale: I believe they will, your Honor.

The Court: Then I assume they will tell us how they made the selection of the people who have been subpoenaed? [163]

Mr. McHale: We can certainly do that.

The Court: So maybe we can draw some deduction as to whether or not this was a representative group.

Mr. McHale: I was going to have them testify as to statistics.

The Court: All right. We will recess until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m.) [164]

December 20, 1957, 2:00 P.M.

Mr. McHale: Mr. Clerk, I have a stipulation.

The Court: May I see it?

All right. File it.

The stipulation reads:

"It is hereby stipulated by and between the parties hereto, through their respective counsel of record, that if called and sworn as witnesses, a representative of each of the remaining 300 Pavillion Room parties (referred to in Plaintiff's Exhibit 2), and asked the same questions as the four witnesses who have previously testified, each would answer similarly to the answers of the four witnesses previously called regarding the Pavillion Room; it being understood, however, that a few organizations, exclusively male professional groups, not more than six in number, had regular business meetings during the period involved in the Pavillion Room, at which the accordion curtain was not opened and the floor show was not witnessed. This latter proviso is subject to further proof during the course of the trial."

Very well.

Mr. McHale: May that be admitted as an exhibit, your [165] Honor?

The Court: It is filed as a file paper. I don't

know what your practice is here. Do you want the stipulations as exhibits? They can be.

Mr. McHale: I don't know what the best practice is.

The Court: A stipulation can be made orally on the record, just as this is determined to be, but I think we will mark it as an exhibit.

Did we mark the other stipulation as an exhibit?

Mr. Mortenson: Yes, we did.

The Court: Then mark it as an exhibit.

The Clerk: That will be Exhibit G, Defendant's Exhibit G.

(The exhibit referred to was marked as Defendant's Exhibit G for identification.)

## DEFENDANT'S EXHIBIT G

United States District Court for the Southern  
District of California, Central Division

No. 20853-WM Civil

HERBERT D. HOVER, dba CIRO'S, Plaintiff,  
vs.

UNITED STATES OF AMERICA,  
Defendant.

STIPULATION RE THE CUMULATIVE  
EFFECT OF THE TESTIMONY OF PA-  
VILLION ROOM WITNESSES

It Is Hereby Stipulated, by and between the parties hereto, through their respective counsel of

record, that if called and sworn as witnesses a representative of each of the remaining 300 Pavillion Room parties (referred to in plaintiff's Exhibit 2), and asked the same questions as the 4 witnesses who have previously testified, each would answer similarly to the answers of the 4 witnesses previously called regarding the Pavillion Room; it being understood, however, that a few organizations, exclusively male professional groups not more than 6 in number, had regular business meetings during the period involved in the Pavillion Room, at which the accordion curtain was not opened and the floor show was not witnessed. This latter proviso is subject to further proof during the course of the trial.

Dated: December 20th, 1957. [1]

/s/ ERNEST R. MORTENSON,  
Attorney for Plaintiff.

LAUGHLIN E. WATERS,  
United States Attorney;

EDWARD R. McHALE,  
Assistant United States Attorney, Chief, Tax Division;

/s/ EDWARD R. McHALE,  
Attorneys for Defendant.

Received in evidence December 20, 1957 [2]



Mr. McHale: Then we will excuse as a witness Mr. Borisof.

I will call as a witness Mr. Marvin Stephens.

The Court: As I understand it, this written stipulation that was just filed as Exhibit G will take the place of the oral stipulation that we were attempting to formulate before the luncheon recess?

Mr. Mortenson: Yes, your Honor. [166]

### MARVIN E. STEPHENS

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Marvin E. Stephens.

Mr. McHale: I am sorry, your Honor; I was talking to that witness.

Your Honor understands that this is the stipulation that we were discussing?

The Court: Read back what I said, Mr. Reporter.

(The record was read by the reporter.)

Mr. McHale: That is correct, your Honor.

The Court: All right.

### Direct Examination

By Mr. McHale:

Q. Mr. Stephens, what is your occupation?

A. I am a civil engineer for the Metropolitan Water District.

(Testimony of Marvin E. Stephens.)

Q. You arranged a party at the Pavillion Room during this period, didn't you? A. Yes, I did.

Q. For what group?

A. For the Employees Association of the Metropolitan [167] Water District.

Q. Do you have any letters, memoranda, of your arrangements for that party?

A. Yes, I do.

Q. Will you produce them, please?

I ask the clerk to mark as defendant's next in order Ciro's file of the Metropolitan Water District Employees Association, party in Pavillion Room for Friday, May 14, 1954.

The Clerk: Defendant's Exhibit H, marked for identification.

(The exhibit referred to was marked as Defendant's Exhibit H for identification.)

Mr. McHale: I offer it in evidence, your Honor.

The Court: Admitted.

Mr. Mortenson: No objection.

The Clerk: Admitted.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit H.)

Q. (By Mr. McHale): Would you examine Exhibit H, please? You will find in there a white letter dated March 22, 1954, addressed to you, and at the bottom marked "Approved and accepted, Marvin E. Stephens." Is that your signature?

(Testimony of Marvin E. Stephens.)

A. That is.

Q. That is the letter agreement for the party at Ciro's, is that correct? [168]

A. That is the confirmation, yes.

Q. Prior to this date, Mr. Stephens, did you have other correspondence with Ciro's regarding this party?

A. Yes, I did, in a letter of inquiry pertaining to holding a party at Ciro's.

Q. And you have brought that letter with you?

A. Yes.

Q. The reply, is that it? A. Yes.

Q. That is a letter of January 6, 1954?

Mr. Mortenson: One moment, please.

Mr. McHale, when we entered into this stipulation, you told me there was going to be another witness, and that witness would testify to matters other than those covered by the stipulation, is that correct?

Mr. McHale: That's right. This is going to something different.

Mr. Mortenson: May I see that, please?

Mr. McHale: Let me have it marked for identification, please.

The Court: Make it H-1.

The Clerk: Defendant's Exhibit H-1 marked for identification.

(The exhibit referred to was marked as Defendant's Exhibit H-1 for identification.) [169]

Mr. McHale: I offer H-1 in evidence.

(Testimony of Marvin E. Stephens.)

The Court: It is admitted.

The Clerk: Defendant's Exhibit H-1 admitted in evidence.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit H-1.)

The Court: I take it there is no objection, Mr. Mortenson?

Mr. Mortenson: No objection.

Mr. McHale: That's all, Mr. Stephens.

The Court: Have you finished with him?

Mr. McHale: Yes, your Honor.

Your witness.

### Cross-Examination

By Mr. Mortenson:

Q. Who signed that letter, Mr. Witness?

A. Dolores Miller, Mrs. Dolores Miller.

Q. Were your dealings with Mrs. Miller or Mr. Hover on this matter?

A. I dealt with Mrs. Miller.

Q. With Mrs. Miller, is that right?

A. That's right.

Q. Did you talk with Mr. Hover about this at all? A. No. [170]

Mr. Mortenson: That is all.

The Court: Is there going to be some questions here that Mrs. Miller——

Mr. McHale: I know there is one sentence that is

different there that they are going to make some point of.

The Court: You aren't going to raise any contention that Mrs. Miller wasn't authorized to speak for Ciro's?

Mr. Mortenson: No.

Mr. McHale: I didn't want to go into it any further on testimony. The only thing that is different in this letter——

The Court: Just a moment.

Yes?

Mr. McHale: The only thing different in this letter from the others, and the reason I have accepted this one, was that in this particular case mention is made that the increase in price is by reason of the federal tax.

The Court: Yes, I notice that.

Mr. McHale: Thank you, Mr. Stephens.

I forgot, your Honor. I am sorry. Mr. Woodmansee, this takes care of you, too, our stipulation.

That concludes the witnesses I had on the Pavilion Room group, your Honor. We can resume with Mr. Hover on cross at this time.

The Court: Mr. Hover, take the stand. [171]



## HERBERT D. HOVER

recalled as a witness, having been heretofore duly sworn, was examined and testified further as follows:

## Cross-Examination

(Resumed)

By Mr. McHale:

Q. Mr. Hover, I believe you testified with respect to your talent, your arrangement for talent in the main room. First of all, you testified that you were open on a seven-day week, 365 day a year basis; is that correct?

A. Well, most of the time we were on a seven-day week, yes, sir.

Q. You weren't dark any time?

A. We may have been dark, but basically we were on a seven-day week.

Q. When you contracted for talent, that is a floor show, floor show acts, you contracted so you would have acts in there all the time, didn't you? I mean you would always have someone playing?

A. Usually. Sometimes there was a period. But usually we did.

Q. Suppose you had a well-known act, such as one like people mentioned today, Les Paul and Mary Ford, suppose you had them on a two-week basis, what particular day would they start their run? Any particular day?

A. They would generally start the day after the closing [172] day of the previous attraction.

Q. But would there be any particular day of the week when you would ordinarily close or open?

(Testimony of Herbert D. Hover.)

A. I would say in the majority—I would say more attractions open on Friday night than any other night of the week, but we have had attractions open on every night of the week. But more of them open on a Friday night than any other nights—than any other night.

I hope I understand your question correctly.

Q. Yes. Then Friday night would be the night a new act would ordinarily open the majority of the times?

A. I don't know about a majority, but there were more on Friday than any other day.

Q. Supposing you were booking them on a two-week basis, would they play solidly seven days a week?

A. Yes, they would.

Q. No days off in there? In other words, they would work every night for the period of the engagement?

A. Each contract was on its own, but in most cases they would work the two weeks.

Q. You would book your acts somewhat in advance, wouldn't you; you wouldn't wait until one act was in before you booked the next one?

A. We try to. Sometimes a few months, and sometimes we would book an act the same night it would open, if we were [173] in a difficult situation.

Q. But more commonly you would try to have it arranged in advance?

A. So far as we could, we would. But sometimes you can't do it.

Q. Suppose you had somebody, let's just for the

(Testimony of Herbert D. Hover.)

sake of argument or illustration say Les Paul and Mary Ford, going in on a Friday night for two weeks, and this is one of the ones you had booked in advance, suppose you had someone following them at the end of two weeks, when would the next one be booked in? On a Friday two weeks hence?

A. If we had an act—I am sorry to have interrupted you.

Q. That is all right.

A. If we had an act booked in opening on a Friday for a straight two weeks, that means the act would close on a Thursday, unless something else would happen, and in that case we would arrange for the following act to open on a Friday. Unless we may have had a closed house that Friday, or for some reason or other we wanted to open the act on Saturday. But there were different circumstances at all times in California, in L.A., which are different from situations existing throughout the country, where you book an act, let's say, for eight, 10, 12 or 14 weeks, but where we normally would book an act for two weeks we didn't have [174] too much to offer an act. We also paid less than they paid elsewhere, so we had to give in to acts in many instances.

Q. Let's take your illustration here of the act that starts on Friday and runs for two weeks. How would this 14—is that what you call it, 14 out of 15?—contract work? Is that what you call it?

A. Usually it would be like 14 out of 15 days,

(Testimony of Herbert D. Hover.)

if the act would agree to it. If they didn't agree to it, it would be straight 14 days.

Q. Suppose you had an act that would agree to 14 out of 15, would that mean that one night they wouldn't work?

A. No, it wouldn't mean that at all. It meant we had a right to lay the act off for a night. We had that right. It doesn't mean we did it.

Q. One night out of 14 or one night out of 15?

A. Well, if an act was signed for two weeks, but we had the right to play the act 14 out of 15 days, that means we had a right to lay the act off one day out of the 15. We had that right.

Q. You mean that you had a right to continue that act over until Saturday, instead of Friday?

A. No. We would have the right to play the act from a Friday, closing on a Friday, if we laid the act off one night.

Q. In other words, you would close Friday with the [175] act, you would start on a Friday and run through two weeks and then play that following Friday?

A. If we did that.

Q. If you did that? A. Yes, sir.

Q. In other words, you would add onto their time. How much would you pay them? So much for their run, no matter whether they played 14 nights or 15 nights, or how would it work?

A. Well, if they worked 15 days out of 15, they would get what would correspond to two weeks' salary. But, you see, each case is different. For example, we had a case at one time where we had a

(Testimony of Herbert D. Hover.)

closed house, and we paid the act even though they didn't work. That happened many times, we would pay an act even though the act wouldn't work. Sometimes we would go to an act and ask for a concession, say, "Look, we have a chance for a closed house on Sunday, Sunday is an off night for you, doesn't mean anything to you, why don't you take Sunday off and we will close you on Thursday instead of Wednesday?"

Sometimes they would say yes, and other times they would say no.

Each case would depend on its own, depending on our relationship with the act, depending upon the future bookings of the act, how anxious the act was to get away from town, or [176] certain concessions we would make to an act. For an example, give them the privilege of playing a television play, or certain other concessions. Or whether the act was happy or not in the engagement. Many of them were temperamental and big-salaried people.

Q. What was your general way of paying them? Was it per night, per engagement, per week, per performance?

A. You pay an act so much per week, usually as we called it in those days, on a seven-day week. So that if they work a number of days you pay them pro rata, which means one-seventh of the week's pay, if they work extra days, or you might hire an act to work like 10 days for a certain stipulated amount, and if it included two week ends, you would pay them more than if it included one week end. In



(Testimony of Herbert D. Hover.)

other words, you take everything into consideration as well as you can and pay accordingly.

Q. Suppose you had an act that you are paying, let's say \$2,000 per week—I don't know whether that is high or low—but let's say \$2,000 a week.

A. To a night club owner it is high; to an actor, it is low.

Q. \$5,000 a week, is that better?

The Court: No. That is worse for the night club owner. I think he would prefer \$500.

Q. (By Mr. McHale): Let's say it was \$5,000 a week, would [177] you pay that act one-fifth of that for every night they worked, is that the way it would work out?      A. One-fifth?

Q. I mean one-seventh.

A. We pay them at the end of the week. If they open on a Wednesday, we pay them on Tuesday.

Q. Suppose they laid off one night, how much would you pay them—six-sevenths?

A. We would pay them a week on the eighth day. In other words, if an act opened on a Tuesday, the first week would normally be up on Monday when they would be paid. But if they were off one day, by a prearranged stipulation that they were not to be paid, we would pay them a week's pay on Tuesday night. So as they worked seven days out of eight, they would be paid on the eighth day rather than the seventh.

Q. Suppose that on Sunday night there had been a closed house in there, and they had worked for the closed house, they would just work seven

(Testimony of Herbert D. Hover.)

days and get paid, and suppose their pay for that night was the same as it normally would have been, would that have been seven days' work, then?

A. I don't think I quite understand that.

Q. Suppose we had a week situation, just a one-week booking.

A. W-e-e-k?

Q. Yes, one week. And Sunday night there is a closed [178] house, but suppose that the organization has the regular act that is booked into Ciro's on that night, what is the normal thing, that they get paid six-sevenths of their normal week's pay and one-seventh from the group?

A. No, it doesn't work that way, sir.

Q. How does it work?

A. Well, let us say an act opens on a Wednesday night, the first week is up on Tuesday, normally, but they were off on Sunday, well that means that we get them for an opening night, for a Friday night, which is the best week night, and for Saturday night, so that act is more valuable to us on an opening night, Friday night, and Saturday night, than it would be on Sunday or Monday, so we would make certain concessions to an act. So that, as I said before, if we had an act, let's say for a 10-day period with two week-ends, we would have to pay that act more than if we had them for a 10-day period with one week-end. In other words, an act is not worth one-seventh of the weekly salary per day on any day; it is worth maybe three times more on a Saturday night to us, maybe three times more on an opening night, and maybe twice as much on a Friday night.

(Testimony of Herbert D. Hover.)

And on a Sunday night, sometimes we pay an act, if we had to pay an act, and even close down on a Sunday night, because it wasn't worth our while to bring in an orchestra and crew, and so forth, for the revenue we would take in. So it would depend on its own circumstances, [179] on the type of act, whether the act was, using the colloquial expression, hot at the time, what we had to pay the act and so forth.

Mr. McHale: That's all.

The Court: Do you have anything?

Mr. Mortenson: No redirect.

The Court: Step down.

Go ahead. Do you have anything further on your case, Mr. Mortenson?

Mr. Mortenson: The plaintiff rests, your Honor.

Mr. McHale: Mr. Harker.

### GLEN H. HARKER

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Glen H. Harker, H-a-r-k-e-r.

### Direct Examination

By Mr. McHale:

Q. Mr. Harker, what is your business or occupation?

A. I am a representative of the General Electric Company.

(Testimony of Glen H. Harker.)

Q. Did you arrange for a party at Ciro's in 1954? [180]

A. I did.

Q. In the Ciroette Room on the second floor?

A. It was——

Q. Upstairs? A. Slightly up, yes.

Q. That was a group of all men, is that correct?

A. That is correct.

Q. How many in the party?

A. Approximately from 15 to 20.

Q. You had dinner? A. That's correct.

Q. And drinks or cocktails? A. Yes, sir.

Q. After the dinner was over did you go down into the main part of Ciro's? A. Yes, sir.

Q. And you saw the floor show?

A. Yes, sir.

Q. Where did you sit down there?

A. Well, to the right front, up front to the right of the stage.

Q. And you saw the complete floor show, your group did? A. Yes.

Mr. McHale: That is all. Your witness. [181]

### Cross-Examination

By Mr. Mortenson:

Q. Do you recall, Mr. Harker, whether you had any drinks downstairs after you moved downstairs?

A. We did.

Q. Do you remember the price of the drinks?

A. No.

(Testimony of Glen H. Harker.)

Q. Do you recall whether it was more or less than what you had been charged upstairs?

A. I really don't know.

Mr. Mortenson: That is all.

The Court: Do you remember if every member of your party had a drink?

The Witness: I beg your pardon?

The Court: Do you remember whether every member of your 15 or 20 people who went down to see the show had a drink?

The Witness: I presume we did.

The Court: Before you had rented the Citroette Room had you been told that you would be permitted to go down and see the show?

The Witness: I don't recall if we had made any such arrangements.

The Court: When you went down for show time did somebody from management take you down?

The Witness: I don't think so. [182]

The Court: You just wandered down by yourselves?

The Witness: I think so.

The Court: All right. Anything further?

Mr. Mortenson: No more questions.

The Court: Anything further?

Mr. McHale: No more, your Honor.

The Court: Step down, Mr. Harker.

Mr. McHale: The witness may be excused.

Mr. Schiever, please.



## RAYMOND J. SCHIEVER

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, sir?

The Witness: Raymond J. Schiever.

## Direct Examination

By Mr. McHale:

Q. What is your occupation, Mr. Schiever?

A. I am a claim approver for the Prudential Insurance Company.

Q. Did you arrange a party at Ciro's in 1951?

A. Yes, I did.

Q. In the Ciroette Room? [183]

A. Yes, sir, that's right.

Q. For what group?

A. For the employees of the claim division of the Prudential Insurance Company.

Q. Was it a mixed group, men and women?

A. Yes.

Q. With whom did you arrange the party, do you recall?

A. I believe the name was Miss Miller, the person I contacted.

Q. How did you do it? By telephone?

A. Yes, by phone.

Q. Was there any arrangement made whether or not you would see a floor show?

A. Yes, there was.

Q. What was the arrangement?

(Testimony of Raymond J. Schiever.)

A. Well, the arrangement was for a flat fee of a dollar fifty cents a person we would have the privilege of using the Ciroette Room and then would have the privilege of seeing the second floor show downstairs.

Q. At this particular party there was no dinner served, is that correct?      A. No dinner.

Q. No dinner?      A. No. [184]

The Court: What time did the party get started?

The Witness: Approximately 8:30.

Q. (By Mr. McHale): Did your group go down and see the second floor show?

A. Yes, they did.

Q. What was the floor show, do you recall?

A. If I can recall correctly, the headliner was a gentleman by the name of Daniels. It was similar to Billy Daniels, but it wasn't the same person.

Q. Was there a bar in the Ciroette Room?

A. Yes, there was.

Q. Did they have a bartender there?

A. Yes.

Q. Did your group go back up after seeing the floor show?      A. Yes.

Q. Where did you sit, incidentally, when you were in the main floor to see the floor show?

A. It was in the rear, center in the rear, approximately in the neighborhood of their main bar downstairs.

Q. Was it raised up a little bit, the lounge?

A. Yes, it was raised a bit.

The Court: Was it a lounge, did you say?

(Testimony of Raymond J. Schiever.)

The Witness: If you would call it that. There was tables, just the same type tables as in the main floor. [185]

Mr. McHale: Your witness.

Mr. Mortenson: No cross-examination.

The Court: I want to ask you something. This \$1.50 charge was just for the use of the Citroette Room per person?

The Witness: Yes.

The Court: And you paid extra for every drink?

The Witness: Yes, we did.

The Court: What happened—your bill was tallied at the end of the evening?

The Witness: No. It was individually.

The Court: As each one took a drink, he paid for it?

The Witness: That's right.

The Court: What happened when you went down to the main room or the lounge? Did you have a drink there?

The Witness: Yes, sir, I believe we had.

The Court: And there you paid, also?

The Witness: Yes, for the individual drinks.

The Court: You may step down.

Mr. McHale: I have one more Citroette Room witness, your Honor, but he is on call. He is about 10 minutes from the court house. Would this be an appropriate time to take a recess?

The Court: Have you got anything else you want to go ahead with in the meantime?

Mr. McHale: I haven't right at the moment. I

could call [186] Mr. Hover, of course, as an opposing witness under Rule 43(b), but I have another witness coming in at 3:00 o'clock.

The Court: Just a moment now.

Do you expect that other witness very shortly?

Mr. McHale: At 3:00 o'clock.

The Court: Not before 3:00 then?

Mr. McHale: No, I don't, your Honor.

The Court: All right.

Mr. McHale: I didn't realize that we would move along this fast this afternoon, after this morning.

The Court: All right.

(Recess taken.)

The Court: I want to get a few things straight on the record.

Do I understand that the show began at 10:30 at night?

Mr. Mortenson: Between 10:30 and 10:45.

The Court: All right.

And can we also agree that the accordion curtains were pushed back—what, a half hour before?

Mr. Mortenson: No. At 10:30.

The Court: At the time the show was about to commence, is that the idea?

Mr. Mortenson: Yes.

The Court: Do you also agree, gentlemen—I asked you this the first day, and I want to make sure that we understand [187] one another—that I will not have to sit down or hire Price-Waterhouse to do any accounting for me; that in the event I find that the parties in the Pavillion Room were private, let

us say, until the accordion curtains were pulled back, and public thereafter, that you gentlemen will agree between yourselves on the tax to be paid?

Mr. McHale: The answer is, your Honor, I think that Mr. Hover says he has the tapes from which we can compute the amount of sales at the time that the price went up, which was in most of the cases in the Pavillion Room.

The Court: Then the answer is yes?

Mr. Mortenson: Yes.

Mr. McHale: If we can find those tapes, we can make that computation. We can make that stipulation.

The Court: That will be a stipulation. So that in the event, when I write my opinion, if I do come to that conclusion, let us say, and as I say with all candor at this point I don't know what conclusion I am going to come to, I can say in there that the attorneys have agreed that with the resolution of the proposition of law in this fashion they will agree upon the amount of tax owing?

Mr. McHale: Your Honor understands as far as the government is concerned, we feel they have a burden here, a burden of proof, and that this would be merely an approximation under the so-called Cohan rule, the best we can do under the circumstances, [188] if your Honor came to that conclusion.

The Court: All right. That leads me to the next point.

I suppose this can be off the record.

(Discussion off the record.)



The Court: The dollar amounts I don't care about, you will agree between yourselves, and if I hold that way and a decree is finally submitted to me for signature, it will by agreement include the amount.

Mr. Mortenson: Yes. We now have stipulated that when we get the tapes, Mr. McHale and I, in accordance with our present oral stipulation will stipulate to a dollar amount of tax.

The Court: In the event that the decision is that it was private before 10:30 and public after?

Mr. Mortenson: Yes. I presume it would read that the sales were so much, and 20 per cent applied to that would be so much, if you found that the 20 per cent applied.

The Court: You are getting me into the very thing I don't want to get into. I want you gentlemen to agree or not agree that if I hold it is a public performance after 10:30 you will then agree upon the amount of tax that is owing.

Mr. Mortenson: Very well. It can be done in that form, just as well as the other, yes.

The Court: Unless you have something better that you [189] would like to suggest. My mind is open.

Mr. McHale: Mr. Kroll.

## HERMAN KROLL

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, sir?

The Witness: Herman Kroll.

## Direct Examination

By Mr. McHale:

Q. What is your occupation, Mr. Kroll?

A. I work for the Los Angeles County Auditor's Office.

Q. And did you arrange a party at Ciro's for June of 1954? A. Yes.

Q. June 29th I believe the date was?

A. Yes, as I remember it.

Q. For what group?

A. It was a group of us from the accounting division in the auditor's office in honor of one of our employees who was retiring.

Q. Was it a mixed group? [190] A. Yes.

Q. About how many people attended?

A. Around 30.

Q. You made the arrangements yourself for his party? A. Yes.

Q. With whom?

A. With, I think it was, Dolores Miller.

Q. And——

A. And I contacted her by telephone, and I got a confirming letter.

Q. Do you have a copy of the letter of confirmation? A. Yes.

(Testimony of Herman Kroll.)

Q. You brought it with you? A. Yes.

The Court: Was that in the Ciroette Room?

The Witness: Yes, sir.

The Clerk: Defendant's Exhibit I marked for identification.

(The exhibit referred to was marked Defendant's Exhibit I for identification.)

Q. (By Mr. McHale): It was your understanding, as confirmed by this letter, was it not, that your group would be permitted to see the floor show at Ciro's? A. That's right.

Q. Did they have a bar in the Ciroette [191] Room? A. Yes.

Q. And a bartender up there? A. Yes.

Q. Did you have dinner? A. Yes.

Q. What time did your group arrive?

A. Around 7:00 o'clock.

Q. Then you were taken down to see the floor show, were you, downstairs?

A. No. As I remember it, we had dinner and drinks, and it was just a nice party, and it was the second floor show that we were invited as guests to witness.

Q. Do you remember what the attraction was that night? A. Eddie Albert.

Q. Where did you sit when you went down to see the floor show?

A. Right at the corner of the main room, just off of the stairs that go up to the Ciroette Room.

Q. You sat in the main room? A. Yes.

(Testimony of Herman Kroll.)

Q. Did you go back up afterwards?

A. Some did. I know some went up to get coats and hats. The party really broke up at that time.

Q. As soon as the show was over?

A. Yes. [192]

The Court: That was for the second show, did you say?

The Witness: Yes.

The Court: What time does that go on?

The Witness: By gosh, I don't remember. It was late.

Q. (By Mr. McHale): Would you say it was with relation to midnight, around midnight?

A. It was around that when we got out, as I remember it.

The Court: Well, that is the first show, isn't it? The first show goes on at 10:30. What time does the second show go on, Mr. Mortenson?

Mr. Mortenson: Usually a quarter of 1:00 or 1:00 o'clock.

The Witness: Well, it could have been that late. Gosh, I really don't remember. It has been a long time ago.

Mr. Mortenson: We might ask his wife, your Honor.

The Witness: If I didn't happen to have this letter, I would have forgotten the date.

The Court: It was one of those nights?

The Witness: It was a week day.

Q. (By Mr. McHale): Would you say it was a good party?

(Testimony of Herman Kroll.)

A. It was a very enjoyable party, yes, it was.

Q. What percentage of your group went down to see the show?

A. Well, as I remember, practically everybody. I didn't [193] check. Some probably stayed up and just kept drinking. I know I went down. I didn't check and herd them down. They were just asked to go down, and those who wished did. I know many did.

Mr. McHale: I offer the exhibit next in order.  
Your witness.

Mr. Mortenson: No questions.

The Court: Received.

The Clerk: Exhibit I received in evidence.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit I.)

Mr. McHale: Mrs. Miller.

### DOLORES MILLER

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Dolores Miller.

### Direct Examination

By Mr. McHale:

Q. What is your present occupation, Mrs. Miller?

A. I am with the State Board of Medical Examiners.



(Testimony of Dolores Miller.)

Q. Did you at one time work for Mr. [194] Hover?           A. Yes.

Q. What period of time?

A. From '47 to '56, June of '56.

Q. What were your duties?

A. Well, I went there as his secretary, and then I started taking over the banquet business, which was very small then, and built it up. I should say the last three or four years I was, I guess you could say banquet manager.

Q. We have noticed your signature on many of these agreements, and I assume that you were handling most of the arrangements for most of these banquets at Ciro's, is that correct?           A. Yes.

Q. During the period involved?           A. Yes.

Q. With respect to the Pavillion Room—Incidentally, what were your normal working hours?

A. Usually I arrived there about 9:15 or 9:30 and stayed as long as it was necessary.

Q. Were you around there in the evenings some of the time?           A. Yes.

The Court: You mean 9:15 p.m., is that what you meant?

The Witness: A.M., sir.

Q. (By Mr. McHale): You were there some of the evenings? [195]           A. Yes.

Q. Did you have occasion to observe, over the period of time that you were employed at Ciro's—

A. Yes.

Q. —the practices with respect to the engagement of the Pavillion Room by these various ban-

(Testimony of Dolores Miller.)

quet groups? A. Yes.

Q. With respect to these parties that were booked into the Pavillion Room, was it the normal practice to advise them that they could see the floor show by pulling aside this accordion curtain?

A. Yes.

Q. And as a matter of fact was it the practice that most of these groups saw the floor show?

A. I should say most of them.

Q. There has been a stipulation presented in evidence here that there were a few groups that met rather regularly. A. Yes, sir, that's right.

Q. Perhaps once a month or perhaps not quite as often as that, but during all or part of the period involved, particularly groups of male professional men, groups like that? A. That's right.

Q. In the Citroette and Pavillion Room I think these groups met. Do you recall any specific groups?

A. Well, the most regular one that I recall that was [196] in the Pavillion Room was a group of doctors. It was a medical fraternity.

Q. What was the name of the fraternity?

A. Phi Delta Epsilon.

Q. How often did they meet?

A. Once a month.

Q. How about the summer months?

A. Well, as I recall, most of the regular groups usually skipped August, I think, because so many were away on vacations and so forth. Some of them in July, too.

Q. This group would meet in the evening, I take

(Testimony of Dolores Miller.)

it?       A. That's right.

Q. Would the sliding curtain be open for this particular group? Do you recall?

A. As I recall, in that particular group I should say that more often it wasn't open.

Q. It wasn't open?

A. No. Because, you see, being professional men, they had much to talk about among themselves, and then they did like to play bridge. I recall many occasions when they didn't care about seeing the show.

Q. Can you think of any other specific groups that met in the Pavillion Room to whom this applied on any kind of a regular basis?

A. Unless you consider a yearly party regular. We [197] had many groups who came back year after year because they liked it.

The Court: You mean once a year?

The Witness: Yes, sir.

The Court: Can you recall any yearly groups of this nature where they wouldn't care to see the show, that is what I am meaning when I am phrasing this question?

A. No, I don't recall any such group as that.

Q. This is the only one that you can recall?

A. Yes. I can't think of any other one that came in, as you say, regularly to the Pavillion Room. There may have been. Of course, I have been gone from there a year and a half.

Q. We are not concerned with the period since you have left there. Would you say that perhaps the situation was different in the Citroette Room, which was a small room?

(Testimony of Dolores Miller.)

A. Yes. As I recall, we had about, I think—I know of two, and I think there were three groups that came in once a month over a long period of time.

Q. Would you say the size of the facilities had something to do with which room these groups that didn't care to see the show met in? I mean the size of the space available. Was that the reason they went in the Ciroette Room?

Mr. Mortenson: Just a minute, please. I object to that question, your Honor. I think that calls for what the parties [198] were thinking.

The Court: No, no. Let's find out whether that was discussed.

The Witness: I am afraid I didn't quite understand your question.

The Court: Well, let me ask you this: What caused either you or these people, if you know, to decide whether to rent the Pavillion Room or the Ciroette Room?

The Witness: I see. It was the number of people who were guaranteed to attend the party.

The Court: What minimum guarantee would you want for the Pavillion Room?

The Witness: As I recall, it was 75 persons.

The Court: Anything less, the Ciroette Room?

The Witness: Yes, sir.

Q. (By Mr. McHale): There is no regular group that you can recall of more than 75 people, that is, that would require the facilities of the Pavil-

(Testimony of Dolores Miller.)

lion Room, that would meet regularly, as opposed to once a year?

A. I am thinking now, when you say "regularly" of a certain period of time and regularly scheduled.

There were groups who came in oftener than other groups, perhaps three or four times a year, but I don't recall any offhand that came in more than once a month.

Q. Can you recall any of the ones that came in three, [199] four times a year?

A. I am sorry, I can't think of any specific name.

Q. Now, you dealt with most of the three hundred or so groups that I imagine scheduled the Pavillion Room during the period involved in this lawsuit, and you had conversations with most of the representatives of this group. Would you say that the opportunity to see the floor show was an inducement for them, offered to them as an inducement to book the Pavillion Room?

A. Well, I know that they liked it, of course, as anyone would.

Q. I mean, you sold that floor show, that was one of your selling points that booked the Pavillion Room, was it not?

A. I don't remember that I had to specifically hammer that point, because, you see, the Pavillion Room was a lovely room, and they liked it because it has its private entrance, and for many other reasons, and then many other private rooms in this town don't have private bars for the parties and



(Testimony of Dolores Miller.)

their own bartenders, and that sort of thing. I don't remember that I had to use that above anything else.

Q. With respect to the Ciroette Room, that was many times made an attraction of the room, that the group would be able to see the show?

A. No, I could never have promised them that, that [200] they could see the floor show from the Ciroette Room.

Q. Many times you said if the space were available, they could? A. If it were possible.

The Court: You said something about "above anything else," when you discussed the Pavillion Room as one of the selling features. Is it agreed that it was at least one of the selling features that they could see the show?

The Witness: Yes, I would say so.

May I add this? I do remember a few groups that cared nothing whatsoever about the floor show. They were interested more in the actual facilities of the room.

The Court: Well, I think we have a stipulation to that effect.

Q. (By Mr. McHale): Mrs. Miller, many of the agreements that you prepared and signed and sent out to Pavillion Room groups carried the notation that drinks would be 75 cents until show time and 90 cents thereafter? A. Yes.

Q. With whom did that originate, that particular phrase in the letter, or stipulation or contractual provision?

A. Well, as I remember, periodically we used to

(Testimony of Dolores Miller.)

have conferences to discuss the parties and the procedure regarding them, and so forth, and we would, may I say, hash things [201] over, and I don't remember any reason.

I think it just—of course, we must face the fact that we were having these parties to make money, make a profit, and I think it just seemed that if we could get 90 cents at that time we would get it.

Q. When you say "We would have conferences," who do you mean by "we"—you and who else?

A. Mr. Hover liked to call all of us together, the maitre d', sometimes even the bartenders if one were there in the late afternoon, if he would come in early he would attend, and myself, and anyone else who had anything to do with the parties and making them run smoothly, and so forth.

Q. By whose instruction was the price of the drinks set, that is, at 75 cents or 90 cents?

A. Fundamentally we must face the fact that Mr. Hover was the owner of *Ciro's*, and he had the last word on policies, but that price was set a long time ago. I don't really remember exactly why it was set. It was set because it seemed a good price, I think, and a fair profit.

Q. Would you read that letter, please, Defendant's Exhibit H-1?

Do you recall that?

A. Yes, I do, of course.

Q. Pardon? A. I do, of course. [202]

Q. You see the next to the last paragraph?

A. Yes, I notice here, "Drinks are 75 cents until

(Testimony of Dolores Miller.)

show time at 10:30. After that if you see the show drinks are 90 cents because we must add the entertainment tax."

So, evidently it did enter into it.

Q. That was a consideration then in the price?

A. Yes, it must have been.

Q. That is a letter that you prepared?

A. Yes.

The Court: Are you saying now that it went from 75 cents to 90 cents, the difference being represented to be the amount of the entertainment tax?

The Witness: In this letter I say so.

The Court: What caused you to say that? Was that pursuant to a discussion with Mr. Hover?

The Witness: I don't know.

You see, I wrote a great many of these on my own, and for some reason, probably because I had talked to this man—may I say this? That some groups wanted everything but very specifically. They were a little bit timid about coming to *Ciro's*, in the first place, because, as you know, Jack Benny was always making jokes about a cup of coffee costing a dollar and a half, and people were timid about coming there. So some of them wanted me to put everything in writing, make everything very, very clear, so that they [203] wouldn't have more costs thrown at them at the last moment or something.

The Court: The point that I want to get at is that you testified before that the drinks went from 75 cents to 90 cents simply because it represented a

(Testimony of Dolores Miller.)

good price and a fair profit, and you were there to make a fair profit; do you remember that?

The Witness: I didn't mean by that to imply that it couldn't have been that it was the entertainment tax. I just meant that I don't remember when we started charging that, if I had been told specifically at the time the difference was the entertainment tax. I do not remember being told that.

The Court: If you put it in that letter, would it indicate——

The Witness: This is to a specific group. They may have asked me to put that in, you see, in order that they wouldn't be charged that on top of the price that they had been quoted.

The Court: I understand. So that this statement to them was that that represented the entertainment tax?

The Witness: That's right, sir.

Q. (By Mr. McHale): Did you advise other groups of this over the course of the time involved?

A. I may have if they asked me. I mean—what I am trying to say, and perhaps I am not doing it very well, lots [204] of people when they take the responsibility of setting a party for a large group, they want to have everything in black and white, in order if further charges are added they won't be blamed for it.

Q. With respect to the closed house party, you also handled the arrangements? When I say "closed house," I mean when the entire facilities of Ciro's were reserved, that is, the main room, by one or-

(Testimony of Dolores Miller.)

ganization, for most of the evening, you handled those arrangements, also?      A. Yes, sir.

Q. Were there occasions when a group would engage Ciro's for a night and use the regular entertainment that was booked into Ciro's during that run?

A. Yes, sir, there were several occasions of that sort. They would rather pay our entertainment and music to perform for them than to go to the trouble and expense of assembling what might have been a much less entertaining show.

Q. On some occasions you made the arrangements in advance as to who the checks would be paid to, that is, so much to the orchestra, so much to the entertainers?      A. That's right.

Q. When you made arrangements like that, was that based on what those orchestras and those entertainers would have received that evening had it been a regular scheduled [205] event and Ciro's themselves been running it just open to the general public?

A. I don't remember. On some occasions they paid what they would get from us. I think on other occasions they paid—I think mostly they paid a little more, if I remember rightly. I always told them, you see, to call the orchestra leaders themselves, talk straight to them and make their arrangements with them, and I think sometimes they received more, perhaps, than they would have had we paid them.

Q. Weren't there several occasions, though, when



(Testimony of Dolores Miller.)

they said, "You handle it for us," and you handled it for them?

A. No. I always made it a point of stressing that. Because, for one thing, I didn't have time to do all of it, and I always wanted that to be strictly between them so that if anything went wrong I wouldn't be held responsible. Because that was their responsibility, actually.

Q. At the closed-house parties, so-called, where one group would reserve the main room for an evening, were there occasions when the engagement of the main room would be for part of the evening rather than the entire evening, that is, for the first show?

A. Yes, sir, I think we did have several parties like that where they would come in much earlier, of course, than our regular patrons would come in, and we would hold the room private for them until the middle of the evening, something [206] of that sort.

Q. Then the general public would be admitted after that?

A. Yes, if the group were small enough to allow that being done. So that there would be room in the main room for the public.

The Court: How often did that happen, do you know?

The Witness: Not too often.

The Court: We are dealing with 20 parties here, aren't we?

Mr. McHale: Yes.

(Testimony of Dolores Miller.)

The Court: We must have something specific on that, or a stipulation or something, Mr. McHale.

The Witness: I am sorry——

The Court: I was talking to counsel.

Mr. McHale: We have this, and the agent hasn't worked it out yet, if I may digress for a moment, we have examined the sales records of Ciro's for those 20 parties, and we find that I think on six occasions there are receipts that they consider taxable, as well as the so-called nontaxable receipts. We haven't gone over this with counsel, but I think we can arrive at a stipulation.

Mr. Mortenson: I think, your Honor, we can agree on that.

The Court: All right. [207]

Mr. McHale: I will attempt to have that ready Monday.

The Court: Were those other receipts attached?

Mr. McHale: Yes. In other words, part of them were. On those evenings there were taxable receipts and nontaxable.

The Court: So at least as to those six occasions your contention is going to be when they admitted the public it all became public?

Mr. McHale: All public.

The Court: As I understand, the parties took place in the main room on these occasions?

Mr. McHale: That's right, your Honor.

The Court: All right.

Q. (By Mr. McHale): Mrs. Miller, we have the folders of about 15 or 16 of these 20 parties that are

(Testimony of Dolores Miller.)

in issue in this suit. These are folders which I believe you kept. I am going to hand you the entire bunch and first ask you whether these are your folders on these parties.           A. Yes.

Q. They are?           A. Yes, sir.

Mr. McHale: I think perhaps, your Honor, we could mark them as parts of one exhibit, subdivide them.

The Court: Do they pertain to exhibits already in?

Mr. McHale: No. [208]

The Court: All right. Make it one, with subdivisions.

The Clerk: J and subdivisions. How many are there?

Mr. McHale: There seem to be nine.

The Clerk: That would be J-1 through J-9.

The Court: What are these now? Describe them for the record.

Mr. McHale: These, your Honor, are the Ciro's correspondence folders of the closed-house parties. These are of some of the parties that are in issue. All of these are in issue, but they are the only folders we have, I believe, or were able to locate.

Mr. Mortenson: May we have the former understanding that the doodles are not to be included, your Honor?

The Court: No doodles.

The Witness: I shall never doodle again.

Mr. McHale: May we take them in order, perhaps?

(Testimony of Dolores Miller.)

Q. Would you advise us for the record, please, what J-1 is, which party?

A. Are you speaking to me?

Q. Yes.

The Court: He is asking you to look at it and tell him what party it is.

The Witness: Zeta Beta Tau, Alpha Rho chapter.

Q. (By Mr. McHale): There is a letter in there dated March 13th—— [209]

The Court: What year?

Mr. McHale: 1952.

The Court: Go on. What is your question?

Q. (By Mr. McHale, continuing): ——to Mr. Goldring, in fact there are two letters, March 13th, there are two letters to Mr. Charles Goldring, and I am referring to the shorter letter. Would you look at that, please? A. Yes.

Q. In the second letter, the shorter letter, there is a sentence, "There will be one show at approximately 10:15. Should you decide to use other orchestras and acts than ours, we will be informed within a week from this date of March 13th." Can you determine from that letter whether this group was offered the regular Ciro's acts and orchestra?

A. It would sound so. Of course, this goes back to '52 when I answered you before about whether I had anything to do with the setting the price, or as a go-between between the acts and orchestras. In latter years I didn't. I had them talk between themselves. This goes back to '52, and at that time the party

(Testimony of Dolores Miller.)

volume wasn't as great, and I did attend to some of these, and this confirms an agreement that they would pay \$500 to our acts and orchestras to appear for them.

Mr. Mortenson: May we have the record show what she is looking at now, please?

Mr. McHale: Yes. The witness is now looking at Exhibit [210] J-2.

Which is a letter to whom, Mrs. Miller?

The Witness: Mr. Jack Kotler.

Q. (By Mr. McHale): Which group, can you tell? A. Los Angeles Lodge No. 42.

Q. And it is dated February 22nd?

A. Yes, '52.

Q. You will note that there is a paragraph there which reads: "You have given me no guaranteed number of persons attending. At least one month before May 11th you will give us an approximate number. If this number has reached 300, Ciro's will be closed to the public on the night of May 11th."

A. That's right.

Q. Does that indicate that the question of whether or not this group was a closed party depended upon the number that would attend, is that correct? That is, whether or not the outside public—

A. That's right. That we wouldn't give them a closed house, in other words, for less than 300 persons.

Q. But nevertheless they would be booked into the restaurant, they would be given that number of



(Testimony of Dolores Miller.)

spaces, but other of the general public would be admitted, is that correct?

A. If they did not reach 300? [211]

Q. Yes. A. That's right.

The Court: We are dealing only with main room parties now?

Mr. McHale: That's right. What we designate for the sake of reference "closed-house parties."

Q. With respect to the closed-house parties, generally, Mrs. Miller, when a group reserved *Ciro's* for a night, such as one of these large groups taking over the main part of the restaurant, did *Ciro's* exercise any control over who could come to these parties?

Mr. Mortenson: That is objected to in form. I think she ought to be asked just what happened.

The Court: Overruled. Go ahead.

The Witness: Will you repeat the question, please?

The Court: Read it back, please.

(Question read by the reporter.)

The Witness: Do you mean by that how many could come?

Q. (By Mr. McHale): No. I mean who could come. Did you leave it in the hands of the group themselves, or *Ciro's*?

A. Of course it was their party, they could have whom they chose to have.

Q. It was entirely their responsibility?

A. That's right. [212]

(Testimony of Dolores Miller.)

The Court: And they simply guaranteed you a certain amount of money for a certain number of reservations, is that correct? For example, let us say that there were 200 places that they wanted in the main room, if 150 showed up they would still be responsible for 200, wouldn't they?

The Witness: Say if by the night before their party took place they had guaranteed 200, and only 150 showed up the next night, then we would have charged them the difference. Or if it were a charitable organization, we might have split the difference with them.

The Court: You mean you would give them up until 24 hours before to let you know, is that what you do?

The Witness: That's right.

The Court: If they don't advise you at all, then you assume it is for the number that they have reserved?

The Witness: That's right.

Q. (By Mr. McHale): The next folder I am going to show you, Mrs. Miller, is marked J-3, and there are letters in the file to a Mr. Nat Mallenstein, and they are both June 6, 1952, but the shorter letter in yellow contains a phrase, "At this time I cannot tell you what acts will be appearing here on that date, but if you will call me at a later date I shall hope to be able to tell you then."

Would that file indicate that Ciro's offered to this group the regular entertainment that would have

(Testimony of Dolores Miller.)

been booked [213] into *Ciro's* at the time that the party was scheduled?

A. Well, evidently—I do remember this group, and they were one that preferred to perhaps take a chance on the show that we were having in, because they believed that almost at any time we would have a better show than one that they could put together.

Q. The next folder that I am going to give the witness is marked J-4 and contains several letters.

A. Aren't they for two different years?

Q. Yes. Apparently they involve different occasions. Three letters are to a Mr. David S. Greenberg. Apparently one is an original and another is a copy to Mr. David S. Greenberg, and another letter of the same date, September 21, 1953, to Mr. David S. Greenberg, Midway Hospital. The shorter letter on yellow paper to Mr. Greenberg states:

“This will confirm our agreement that you will pay to Sammy Davis, Jr., the sum of \$750 to appear for the party to be given on Tuesday, December 22nd, 1953, by the Midway Hospital, at *Ciro's*.

“I am sure, knowing Sammy, that he will be delighted to include some ‘local’ bits in his show.

“You will pay the sum of \$225 for our large band and a rhumba trio. You will pay this sum [214] directly to the musicians.”

Would this be another group which engaged the regular *Ciro's* acts and orchestra? A. Yes, sir.

Q. The next file I present the witness is marked J-5 and is addressed to what group, Mrs. Miller?

A. Save A Child Guild of Mount Sinai.

(Testimony of Dolores Miller.)

Q. And there is a short letter in the file dated February 17, 1953, to Mrs. Leon Esensten.

“Dear Mrs. Esensten:

“This will confirm our agreement that the Save A Child Guild of Mount Sinai will pay the sum of \$375 for a show and two orchestras on the night of Sunday, November 8, 1953, for their party at Ciro’s.

“This sum will be paid directly to the acts and to the musicians.”

Would this be another party at which the group engaged the regular acts that would appear at Ciro’s? A. Yes, sir.

Q. The next file is marked J-6. Will you state what group this is, Mrs. Miller?

A. Lions International Fourth District Convention.

Q. There is a short letter in the file, December 1, 1953, to Dr. Clyde Martyn. [215]

“Dear Dr. Martyn:

“This will confirm our agreement that the Lions International Fourth District Convention will pay the sum of \$750 to our show and orchestras current on the date of their party to be held on Thursday, January 21, 1954, at Ciro’s.

“The maitre d’hotel will inform you as to what part of this amount will be paid to the show and what part will be paid to the orchestras.”

Would this be another such party where the group scheduled the regular Ciro’s entertainment?

A. That’s right.

(Testimony of Dolores Miller.)

Q. The next file is J-7. Will you tell us what group that is, Mrs. Miller?

A. Junior Helping Hand.

Q. And there is a letter in that file of June 11, 1954, to Mrs. Lee J. Goodman.

“Dear Mrs. Goodman:

“This will confirm our agreement that you will pay not less than \$500 and not more than \$600 to our show and orchestras current at *Ciro's* on the date of September 26, 1954.

“We shall advise you as soon as the show is booked for that period as to who will appear on the show and as to the exact amount you will pay to them [216] to appear for the Junior Helping Hand party to be given on September 26, 1954.”

Is that another such party which utilized the regular acts booked at *Ciro's*?      A. Yes.

Q. The next file is marked J-8. What group is this, Mrs. Miller?      A. The Times Dealers.

Q. And there is a letter in there to Mr. Robinson dated January 18, and one paragraph reads:

“You will pay to our current show and orchestras not less than \$500 and not more than \$600. As the show at this moment has not been signed we cannot give you a more definite sum. However, as soon as the show is signed we shall notify you.”

Would that indicate that that group was going to book the regular entertainment booked in *Ciro's*?

A. Yes, sir.

Q. The next file is J-9. Can you tell what group that is, Mrs. Miller?      A. Culver City Hospital.



(Testimony of Dolores Miller.)

Q. And there is a letter in that file dated October 26, 1953, to Mr. William C. Hoppe, H-o-p-p-e: [217]

“Dear Mr. Hoppe:

“This will confirm our agreement that the Culver City Hospital will pay the sum of \$500 to our current show and orchestras on Thursday, December 17, 1953.

“Tentatively, we have arranged the schedule as follows: The rhumba band will begin playing at 8:00 alternating rhumba music with American music; the large American band will begin playing at 10:00.

“Your show will go on at approximately 10:00 or 10:30.”

Would that be another such party where the regular entertainment was booked?

A. Yes.

The Court: Are you about through?

Mr. McHale: Your witness.

Mr. Mortenson: No cross-examination.

The Court: All right.

The Clerk: Your Honor, will these be admitted in evidence?

The Court: Yes, they are all admitted.

(The exhibits referred to were received in evidence and marked as Defendant's Exhibits J-1 to J-9.)

The Court: Recess until 10:00 o'clock Monday morning. [218]

Excuse me a moment. Before we recess, there is one other thing I want to get clear in my mind. I

think you raised the question of the statute of limitations for about four months. Can we take that out of the case here?

Mr. McHale: We filed a waiver, your Honor.

Mr. Mortenson: I didn't know they had waivers. It only involves \$100, anyway.

The Court: Those are the issues that take the longest to decide.

All right. 10:00 o'clock.

(Whereupon, at 4:10 o'clock p.m. an adjournment was taken to 10:00 o'clock a.m., Monday, December 23, 1957.) [219]

December 23, 1957—10:00 A.M.

The Court: All right, gentlemen.

Mr. Mortenson: Ready for the plaintiff.

Mr. McHale: Ready for the United States. Mr. Penn take the stand please.

#### WARREN PENN

called as a witness by the defendant, being first sworn, was examined and testified as follows:

Mr. McHale: Before I commence with this witness, your Honor, earlier in the trial we told the court that we would have during the course of the trial stipulations as to what Ciro's books and records showed with respect to the receipt, or the recording of taxable receipts on the same night that closed house parties were scheduled, that is, the tax on the same night that closed house parties were scheduled, and the revenue agent has prepared such

(Testimony of Warren Penn.)

an exhibit showing that on six of the 20 taxed occasions there were some six receipts shown on Ciro's——

A. This deals only with six occasions?

Mr. McHale: It shows receipts on 20 parties and receipts on the six occasions as well as the 20 parties.

Mr. Mortenson: No objection.

The Court: All right, received.

(The document referred to was admitted in evidence as Defendant's Exhibit K.) [220]

Mr. McHale: I ask that at the close of the day's examination that the exhibit be withdrawn for photostating and returned. We can probably get it done today.

The Court: All right.

#### Direct Examination

By Mr. McHale:

Q. Mr. Penn, what is your occupation?

A. Well, I am retiring the first of the year as executive vice-president of National Electrical Contractors Association of Los Angeles.

Q. Well, you were with that association back in 1954, weren't you?      A. Yes, sir.

Q. You arranged for a party at Ciro's restaurant?      A. Yes, sir.

Q. With whom did you make the arrangements?

A. Well, the first party I talked with was a little girl named Miss Miller, I believe it was Dolores Miller, and then the night of the party the final ar-

(Testimony of Warren Penn.)

rangements were discussed with the maitre d' by the name of Johnnie; I don't know his last name.

Q. Mr. Oldrate?

A. I believe that was his name. It was a difficult name for me to remember.

Q. How far in advance do you recall you made these [221] arrangements of the party itself?

A. Well, we talked to Miss Miller quite a bit in advance because we were of the opinion that most of the places were sold out considerably in advance and I believe we talked to her oh, possibly two or three months in advance. Our request at that time was to try to get a date when there would be top-notch entertainment there.

Q. What sort of a party were you planning at Ciro's?

A. Well, a regular dinner party. We usually have about 250 or 285 people come and we give them the dinner free of cost, the association pays for it. They buy and pay for their own drinks, and then after that with their dinner we have just a couple or three short announcements, and we have the program come on.

Q. This was to be an occasion when you took over Ciro's restaurant, and not an occasion in which you took over just a room?

A. No, it was a closed night.

Q. What arrangements were made when you were planning this party with respect to entertainment, can you tell us?

A. Well, we made an arrangement whereby the

(Testimony of Warren Penn.)

—Cugat and his group would be there that night, and they were to be the entertainment on the program.

Q. Was Cugat and his group the ones that were currently playing at Ciro's at the time the party was there? [222]

A. That's what I understand, yes, sir.

Q. What arrangements did you make with Mr. Oldrate, the maitre d', with respect to payment for the entertainment?

A. Well, we understood that when we gave the dinner to our members free of cost to them that we could make an arrangement with the entertainment and pay them direct if we wanted to do that, and that is what we did.

Q. How did you pay for the entertainment, do you recall?

A. We made out a check direct to Mr. Cugat and a check was given to him.

Q. With whom did you discuss the amount of this check to Mr. Cugat?

A. With Mr.—what is his name?

Q. Oldrate. A. Yes.

Q. You never made any arrangements with Mr. Cugat with regard to this show?

A. No, I didn't talk to him.

Q. Or with any theatrical agents for Mr. Cugat?

A. No, none whatever.

Q. All your arrangements were made with the management, that is the personnel of Ciro's?

A. Yes, with Johnnie Oldrate.



(Testimony of Warren Penn.)

Q. To whom did you give the check made to Mr. Cugat? [223]

A. I had the check made out and Mr. Oldrate asked me if I had a check for the money, and I said: "Yes, I am going to give it to Mr. Cugat in a minute."

He said, "Give it to me and I will give it to him." So I gave him the check and I guess he gave it to them.

Q. Were there any people who were not members of your group admitted to the restaurant that night?

A. Yes, there was a very few.

Mr. McHale: Your witness.

### Cross-Examination

By Mr. Mortenson:

Q. Mr. Penn, did you give more than one party at Ciro's?

A. Offhand I believe we gave three or four up there.

Q. On how many of those occasions were a few people let in from the public?

A. If I remember it this was the only one.

Q. What happened in that connection as far as you were concerned?

A. Well, I think Johnnie come to me and said, "Here are some friends of ours who we would like to have as guests to see the show," and they come and sat down at a table, about—I think it was six or eight of them, and Johnnie wanted to know if that would be all right with me, and I told him it would,

(Testimony of Warren Penn.)

providing if they had any food or drinks they would pay for it themselves and wouldn't put it on our bill, [224] and I think they stayed and saw the show; that was all.

Mr. Mortenson: No further questions.

The Court: When was this party had, do you remember?

The Witness: Yes, sir, I do; it was had on Friday, June 10, 1954.

The Court: May I see that last exhibit? I might say for the record that this is not one of the days that the Government asserts the outside public was admitted.

Mr. McHale: No, I think we didn't consider that this was of a substantial nature.

The Court: It is not included in the list as one for which any outside taxes were paid.

Mr. McHale: Thank you, Mr. Penn.

(Witness excused.)

Mr. McHale: Mr. Hirschhorn, please.

### SOL HIRSCHHORN

called as a witness by the defendant, being first sworn, was examined and testified as follows:

#### Direct Examination

By Mr. McHale:

Q. Mr. Hirschhorn, what is your occupation?

A. At present I am executive director of the California Credit Merchants Association here in town.

(Testimony of Sol Hirschhorn.)

Q. Were you connected with that organization in early 1955? [225]      A. I was.

Q. Did you arrange for a party at Ciro's restaurant?      A. I did.

Q. With whom did you make the arrangements?

A. With Dolores Miller.

Q. Do you have any record of any papers or anything in connection with the making the arrangements?

A. I do. This is the contract (indicating).

Mr. McHale: Two letters dated November 1, 1954. I ask they be marked for identification.

The Clerk: Defendant's Exhibit L marked for identification.

Mr. McHale: I offer L as our next in order.

Mr. Mortenson: No objection.

The Court: Received.

(The document referred to was received in evidence as Defendant's Exhibit L.)

Q. (By Mr. McHale): When you made the arrangements for this party what type of a party was it to be, taking over of the entire restaurant?

A. Yes. This was a closed affair, it was our annual Merchandiser Award, where we make an award to the industry, to a manufacturer.

Q. At the time you made the arrangements for the party what arrangements did you make about entertainment at the [226] party?

A. We spoke about entertainment at the time and we told them that we would prefer entertainment.

(Testimony of Sol Hirschhorn.)

and when the question came it was specifically told to us that as far as Ciro's are concerned the contract was for food and for the food alone. I told them that I would like to have entertainment and if they could possibly get it for us. They told us at the time, rather, Miss Miller told us at the time she would be glad to help me, but it was specifically understood at the time that we could bring in our own entertainment and if possible, I told them to get their entertainment that was there that week, because we could get it at a lower cost than drawing in outside entertainment.

Q. What was the entertainment currently appearing at Ciro's the week of the party?

A. At the time of this contract there was no specific understanding as to any entertainment, because at that time they didn't know who would have booked for the night of the affair. Their bookings were usually about a month before. That night they had the Catherine Dunham show and Dick Stabile, that was the music, and they had a rhumba band, that was Jack D. Costanza.

Q. What arrangements were made for paying this entertainment?

A. We were to pay them directly as the contract, the [227] second contract that you have there provided that the entertainment was to be paid by us directly.

Q. How did you determine the amount they were to be paid?

(Testimony of Sol Hirschhorn.)

A. We set a budget of \$600, that there would be no costs above that amount.

Q. How did you arrive at the amounts of the checks you wrote to the various entertainers?

A. Well, we were told how to divide the \$600 the night of the affair.

Q. By whom?

A. It would be by either one or two persons; I have no independent recollection, either by this Miss Miller or this Johnnie, the maitre d', Johnnie——

Q. Oldrate.           A. Oldrate, yes.

Q. You have brought with you, I assume, the cancelled checks. Is that correct?

A. I have them here. These are the three checks that represent the entertainment, and these two checks represent the food.

Mr. McHale: May these all be marked as sub-exhibits of our next exhibit in order?

The Clerk: Defendant's Exhibits M-1, M-2, M-3 are marked for identification. [228]

Mr. McHale: And as the next in order two sub-exhibits, the ones paying for the food, as N.

The Clerk: Defendant's Exhibits N-1, N-2.

Mr. McHale: At this time I offer Exhibits M-1, -2 and -3 in evidence.

Mr. Mortenson: No objection.

The Court: Received.

(The documents referred to were received in evidence as Defendant's Exhibits M-1, M-2 and M-3.)



(Testimony of Sol Hirschhorn.)

Mr. McHale: I offer Exhibits N-1 and N-2 in evidence.

Mr. Mortenson: No objection.

The Court: Received.

(The documents referred to were received in evidence as Defendant's Exhibits N-1 and N-2.)

Q. (By Mr. McHale): At this party you restricted the people attending in some way, did you?

A. Correct. Only to the invited persons or personnel from our organization.

Q. How many shows were provided, do you recall? A. One show.

Mr. McHale: Your witness.

Mr. Mortenson: No questions.

(Witness excused.)

Mr. McHale: Mr. David Greenberg. [229]

#### DAVID S. GREENBERG

called as a witness on behalf of the defendant, being first sworn, was examined and testified as follows:

#### Direct Examination

By Mr. McHale:

Q. Mr. Greenberg, what is your occupation?

A. I am a controller at the Midway Hospital.

Q. In 1953 were you connected with the hospital?

A. Yes, I was.

Q. Did you arrange for a party at Ciro's restaurant December 23rd, 1953? A. Yes.

(Testimony of David S. Greenberg.)

Q. What type of a party was this that was arranged, was it in any particular rooms of the restaurant? Will you explain?

A. Well, it was for the use of *Ciro's* that evening for the medical staff of the hospital.

Q. Who paid for the party?

A. The hospital paid for it as part of the dues of the medical staff.

Q. You are the one who made the arrangements for the party in advance? A. Yes.

Q. With whom did you discuss the party in advance, I mean, the arrangements? [230]

A. The arrangements were made with the lady by the name, I believe it was Miss Miller.

Q. Was that made some time in advance of the party?

A. Oh, about maybe a month to a month and a half.

Q. What arrangements did you make with respect to the provision of entertainment at the party?

A. That we were to have the regular show that evening.

Q. Did you know at that time what the regular show was?

A. I do not believe I knew at that time but we did know before the night of the party.

Q. What was the entertainment that was actually provided at the party? A. Sammy Davis, Jr.

Q. Was there other entertainment, orchestra and so forth?

A. Their regular orchestra, I believe was Dick

(Testimony of David S. Greenberg.)

Stabile, and a rhumba band, and I don't recall the name of the orchestra.

Q. How were the people admitted, by ticket, to the affair?

A. Each doctor was given two invitations and he was checked off at the door and the ticket, the invitations, were given to the waiters at the time the dinner was presented and we were to pay by the number of tickets presented. [231]

Q. How much space at *Ciro's* did you use, did you use the main room, I suppose the regular nightclub part? Did you use any other portion?

A. We used that main room and then as I recall there is a partition to the right as you enter, and that was opened, we used both those rooms.

Q. Do you have any papers of the arrangements you made with *Ciro's*?

A. All I have are the bills that were presented in 1952 and 1953.

Q. You mentioned bills for a party in 1952? These are the records of *Ciro's* restaurant party—the Midway Hospital had at *Ciro's* restaurant for the previous year? Is that correct? A. That is.

Q. They are contained in the files of the Midway Hospital of which you are controller?

A. That is correct.

Mr. McHale: I ask the bill of December 10, 1952, be marked for identification.

The Clerk: Defendant's Exhibit O.

(The document referred to was marked Defendant's Exhibit O for identification.)

(Testimony of David S. Greenberg.)

Q. (By Mr. McHale): You did not attend the December 10, 1952, party?

A. I was not connected with the hospital at that time. [232]

Mr. McHale: I offer as Government's next in order the records of the Midway Hospital with respect to the party held at Ciro's December 10, 1952.

Mr. Mortenson: If your Honor please, the party we are talking about here I believe refers to December 23rd, 1953; but I have no objection to these going in the record.

The Court: All right.

(The document referred to was received in evidence as Defendant's Exhibit O.)

Mr. McHale: I ask the clerk mark for identification a statement of Ciro's dated December 22, 1953.

The Clerk: Defendant's P is marked for identification.

Mr. McHale: I offer as next in order the statement of Ciro's Exhibit P for identification in evidence.

The Court: Does that deal with which party?

Mr. McHale: That is the party which Mr. Greenberg attended and arranged for.

The Court: Which one, December 22nd, 1953?

Mr. McHale: Yes. I am sorry. May I show it to the witness?

Q. You cannot at this time find the cancelled check with respect to this party? Is that right?

(Testimony of David S. Greenberg.)

A. I attempted to. We have had a revenue audit since that time so the checks were——

Mr. McHale: I offer to stipulate at this time that [233] the entertainment was paid by separate checks to Dick Stabile in the sum of \$187; Tony Terran Orchestra, \$99; Sammy Davis, Jr., \$689, and Ciro's \$3,511.10, plus \$100 deposit made in September.

Mr. Mortenson: That would be less.

Mr. McHale: Less \$100, yes. No, it was plus that, I think.

Mr. Mortenson: Well, the document will show that the total amount was \$3,161.10, with a deposit subtracted of \$100, leaving a total of \$3,061.10, plus gratuities of \$450, for a total of \$3,511.10. So stipulated.

The Court: May I see it please?

Q. (By Mr. McHale): At the time you made the arrangements for the party did you know what show you wanted?

A. Not at the original preliminary checkup, no.

Q. What arrangements were made with Ciro's with respect to the entertainment?

A. Well, we just asked them for the regular show.

Q. What arrangements were made as to how you would pay them?

A. I don't recall any arrangements being made until after the evening was over, and that evening before we left we paid for the entertainment.



(Testimony of David S. Greenberg.)

Q. How did you arrive at the amounts, do you recall?

A. Well, it was a certain amount per dinner and then, if I recall, at that time we wanted a maximum figure, and [234] the dinner was to take care of a certain portion of that.

Q. How did you arrive at the amount the entertainers were to be paid, was that told to you by Ciro's?

A. That was told to us the evening of the affair, yes.

Q. Who was the entertainment, Sammy Davis, Jr.?      A. Right.

Q. Do you recall whether people outside of the medical staff of the hospital attended this party?

A. There was nobody there while I was there.

Mr. McHale: Your witness.

Mr. Mortenson: No cross-examination.

Mr. McHale: Is there a Mr. Hoppe here?

(No response.)

Mr. McHale: That concludes the closed house witnesses, your Honor.

The Court: Very well.

Mr. Mortenson: We have a stipulation with respect to the closed house parties I think we can arrive at, and save some time on the witnesses.

Mr. McHale: I would stipulate and like counsel to stipulate that in arriving at the part of the assessment that relates to the closed house parties that the

agents examined the books and records of Ciro's and determined that during the period involved there were 32 occasions on which [235] apparently the entire facility, that is, the main room, had been reserved by one organization, and that using the criteria which the agents have used, that is, as to who furnished or provided the entertainment, that they eliminated from taxation 12 of those, and that the 20 parties which are the subject of this particular dispute are those in which they applied their criteria that the groups utilized the regular services and entertainment of Ciro's rather than providing their own entertainment.

Mr. Mortenson: I am agreeable to that stipulation but of course I am not stipulating that the criteria they used——

The Court: Is correct.

Mr. Mortenson: ——is correct.

The Court: No question about it.

Mr. McHale: Mr. Ross, will you take the stand?

The Court: You are not offering anything in connection with that stipulation, are you?

Mr. McHale: No, since we have stipulated, your Honor, I think it takes care of the ultimate facts, so why clutter the record?

CHESTER M. ROSS

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: State your full name, please. [236]

The Witness: Chester M. Ross.

Direct Examination

By Mr. McHale:

Q. What is your occupation, Mr. Ross?

A. I am internal revenue agent working in the Los Angeles area.

Q. How long have you been an internal revenue agent?

A. I have been in the Internal Revenue Service since October '49.

Q. What is your education and background?

A. I graduated from a local university, majored in economics and had quite a bit of accounting.

Q. Which university was that?

A. UCLA, University of California at Los Angeles.

Q. How long have you been working on cabaret tax or excise taxes?

A. I have been in the excise tax field audit group since, oh, July, 1952.

Q. During the course of your duties as internal revenue agent were you assigned examination of Herbert Hover, doing business as Ciro's restaurant?

A. I was.

Q. In connection with that you examined the books and records of Ciro's to determine whether

(Testimony of Chester M. Ross.)

they paid the [237] proper amount of tax according to the Government's standards? Is that correct?

A. Yes, sir, I did.

Q. Could you explain to the court how you arrived at the figure of 94 per cent of the receipts of the main room as being subject to the cabaret tax?

A. Well, in the examination of the taxable sales that the taxpayer had reported and compared with the total sales of the main room, disclose that 94 per cent of the main room receipts had been subjected to the cabaret tax. It was our feeling that on the basis or from the manner in which the Pavilion Room was operated that by and large those receipts, the Pavilion Room receipts should be taxed at approximately the same percentage.

Q. Mr. Ross, explain, will you, how the actual mechanics of charging or not charging the tax are handled in the main room and the lounge? I think that has been a point that has been a little unclear, and I thought perhaps you might clear that aspect of accounting.

A. By and large the patron seated in the main room and lounge, waiter checks are used and the total charges and the taxes are added to those checks as purchases are made, and the check is presented to the patron when he calls for it, or when he leaves. With respect to the lounge bar generally drinks are purchased and paid for as purchased [238] so that the taxpayer's practice has been to sub-total the lounge bar register at 9:00 o'clock, the purchases being run that register after 9:00 o'clock

(Testimony of Chester M. Ross.)

then are representing the taxable receipts. The difference in treatment generally arises from the fact that the bar purchases are paid for as purchased and there is no way of controlling who comes and who goes and whether the tax should apply or not except by the use of this method. We accept this method if we feel that the taxable receipts, or the cut-off hour reflected, if the cut-off hour receipts—subsequent to the cut-off hour—show a reasonable tax of the taxable receipts.

The Court: Is it your statement all bar purchases after 9:30 p.m. carry the tax?

The Witness: No, the checks themselves which are used for patrons that are seated, there is no difficulty as far as the management is concerned, if a patron leaves before the show there would be no tax added to that check.

The Court: Even if it is after 9:00 o'clock?

The Witness: Even if it is after 9:00 o'clock.

The Court: Supposing a new patron came in?

The Witness: If he actually stayed and didn't pay his check until he left, or remained after the show or dancing started by 9:30, then the tax would be added to the check.

The Court: So that at 9:30, is that when the tax begins? [239]

The Witness: I believe that is true, yes, sir.

Q. (By Mr. McHale): But the lounge bar purchases are paid for as purchased, so that the six per cent then represents the people who left before the entertainment, that is, the dancing started?



(Testimony of Chester M. Ross.)

A. The six per cent would represent the non-taxable portions; by and large, of that lounge bar tape, that is to say the ring-ups occurred before 9:00 o'clock and to some extent there may be some checks which were not taxed because patrons left before the dancing or entertainment, some few; there may also have been some checks to entertainers, which are not subject to the tax.

Mr. McHale: Your witness.

Mr. Mortenson: No cross-examination.

Mr. McHale: There is a waiver of the statute of limitations. I know in plaintiff's complaint, I think in paragraph 48, there was a contention made that part of these taxes may have been assessed too late. But there is a waiver.

Mr. Mortenson: Can't we simplify that by admitting that?

The Court: I thought I got that Friday.

Mr. McHale: Yes.

The Court: Off the record.

(Discussion off the record.)

Mr. McHale: The Government rests. [240]

Mr. Mortenson: There is just one further thing, your Honor. We are trying to locate these tapes. I wonder if I could have these marked for identification?

The Court: People's Exhibit 9.

(The exhibit referred to was marked Plaintiff's Exhibit 9 for identification.)

Mr. Mortenson: So that you might understand what it is we are trying to do, your Honor, I would like to——

The Court: Is that marked for identification?

Mr. Mortenson: Yes, just marked for identification.

The Court: Yes.

Mr. Mortenson: There is a date on each of these tapes and at a breaking point——

The Court: Where is the date? I don't see it.

Mr. Mortenson: In one case it is at the bottom, I believe, and the other at the top.

The Court: This is the Pavilion Room, June 21st, 1953?

Mr. Mortenson: Yes. At one point you will note that "75" stops recurring and "90" starts in, and then at the end of the tape it jumps from key No. 1, there is a Roman one to the right, over 2, 3 and 4.

The Court: Yes.

Mr. Mortenson: And then with Ciro's, that is the way of closing out a tape to show that the evening is over.

The Court: I see. [241]

Mr. Mortenson: So that when we find a tape we can determine how much the sales were after the prices were increased.

I don't know what we are going to do if we don't find the tapes, but I am going out this afternoon and see if I can help. The bookkeeper Mr. Hover had during this period is no longer there.

The Court: Once again, I want to get this part of it clear. Mr. McHale, I want you to listen to me.

Mr. McHale: Yes, your Honor.

The Court: Whether you locate the tapes or don't locate the tapes, as I understand it you gentlemen will stipulate as to the amount of tax owing in the event that I enunciate the principle of law that is applicable.

Mr. Mortenson: I don't know just how we are going to go about this. You are going to be in this afternoon, Mr. McHale? Then I will discuss this with you so that we can arrive at a method before we reconvene, so that there can't be any dispute as to how we are going to do this; if we have the tapes there is no problem.

The Court: Off the record.

(Discussion off the record.)

Mr. McHale: If your Honor announces a decision in which the amount of tax depends on the record, and so forth, I am sure we can stipulate as to the amount. It's a [242] mechanical problem and I am sure we can agree upon that.

The Court: That is the point I am trying to get at. Now, gentlemen, what is your wish? You are finished with your presentation of evidence, is that correct?

Mr. Mortenson: Yes.

The Court: Both sides rest. You will have your final briefs for me Thursday morning?

Mr. Mortenson: Yes, your Honor.

Mr. McHale: Yes, your Honor.

The Court: Do you want to make a brief argument Thursday?

Mr. Mortenson: Yes.

The Court: What do you want to adjourn to, the usual time of 10:00 o'clock?

Mr. Mortenson: Yes, I would prefer it to 10:00 o'clock.

The Court: All right, court is adjourned to 10:00 o'clock Thursday morning.

(Whereupon, at 10:50 o'clock a.m. the hearing was adjourned to reconvene at 10:00 o'clock a.m., December 26, 1957.) [243]

Thursday, December 26, 1957, 10 A.M.

The Clerk: Case No. 20853-WM Civil, Hover vs. United States of America, for further trial.

The Court: All right, Mr. Mortenson.

Mr. Mortenson: If the court please, before we proceed with the arguments, I believe we have a stipulation to be entered.

Mr. McHale: Well, I want to say something about that, your Honor, as your Honor has requested in the event that your Honor reaches a decision on one party's theory of the case that we could agree. Now, I said that I thought we would be able to, and Mr. Mortenson and I have sat down and gone over what we could agree upon and we have come to this agreement which we have made in writing, which is essentially this: We could agree upon probably when the drinks were served and when the meals were served, and we do that completely on estimates, but the plaintiff doesn't have any records, or just fragmentary records. I think

the ones that were introduced for identification were the only ones we have been able to find, of the time at which payments were made.

So the only agreement we can come to is when the service of food was made and I think we can pretty clearly agree that it was made before show-time and before the hour of [246] 10:30 p.m., and as to when the drinks were served we just sat down and figured the approximate time upon the refreshments served and prorated that before 10:30 and after 10:30.

The Court: What is your agreement on that?

Mr. McHale: It is reduced here to the dollar amounts for the Pavillion Room, as to what the tax would be if it were computed on that basis. Of course, the Government doesn't agree that this is a proper basis. So we believe that if your Honor's decision should be upon this basis, then it could become a part of the case.

The Court: Well, it should be filed. It is worded in the alternative, isn't it?

Mr. Mortenson: Yes, it is.

Mr. McHale: I want to make the specific objection.

The Court: Let me ask you this: What do you refer to in your stipulation, Mr. Mortenson? It is stipulated "That two-thirds of the refreshments were served to the patrons of the Pavillion Room before show time of 10:30 p.m. and one-third thereafter." Is that the substance of your agreement?

Mr. Mortenson: That is the substance.

Mr. McHale: The actual substance. As you re-



member, Plaintiff's Exhibit No. 1 showed that it was \$55,581.98, taxes assessed on Pavillion Room receipts and on this theory, that is as to when drinks and refreshments were served or taken to the parties in the Pavillion Room, the \$39,980.08 would [247] represent the tax on the food served and \$10,401.27 would represent the taxes on beverages served prior to 10:30 p.m., leaving \$5,200.63 representing the taxes on the beverages served after 10:30 p.m. Of course, the Government doesn't believe this is the proper criteria.

The Court: I understand.

Mr. McHale: But this is what we can agree upon, subject to our objections as to materiality and relevancy.

The Court: All right. It will be filed.

Mr. McHale: And further I want to state, of course, that this is just an approximation and goes to the whole Government theory on the burden of proof here, that the plaintiff didn't have records.

Mr. Mortenson: I might say, your Honor, on that, we gave an awful lot on that.

The Court: There is no sense of arguing that point now. The point is that that is a stipulation and you are agreeing to it in the event I may decide it based on that theory of law.

Mr. McHale: Based on the time of service.

The Court: The approximation is not strictly correct. That is an agreement, an understanding, as I understand it?

Mr. McHale: We want to make it clear we cannot stipulate that that is the time the payments

were made, as to either the meals or the beverages, because we submit it just cannot [248] be determined.

The Court: All right.

Mr. McHale: The evidence is conflicting.

Mr. Mortenson: If Mr. McHale is going to make anything of that argument, I would like a few minutes of rebuttal on that issue, because I don't think it has been briefed.

The Court: Proceed with your argument.

Mr. Mortenson: May I have a few minutes for rebuttal argument when Mr. McHale is through?

The Court: I will see. If it is necessary.

Mr. Mortenson: Thank you.

(Argument on behalf of plaintiff, by Mr. Mortenson.)

(Argument on behalf of Defendant, by Mr. McHale.)

(Closing argument on behalf of Plaintiff, by Mr. Mortenson.)

The Court: I will reserve decision. [249]

### Reporters' Certificate

We hereby certify that we are duly appointed, qualified and acting official court reporters of the United States District Court for the Southern District of California.

We further certify that the foregoing is a true and correct transcript of the proceedings had in

the above-entitled cause on the dates specified therein, and that said transcript is a true and correct transcription of our stenographic notes.

Dated at Los Angeles, California, April 17, A.D. 1958.

/s/ J. D. AMBROSE,

/s/ AGNAR WAHLBERG,

/s/ SAMUEL GOLDSTEIN,

/s/ THOMAS B. GOODWILL.

[Endorsed]: Filed July 18, 1958.

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[Title of District Court and Cause.]

### CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 198, inclusive, containing the original:

Complaint.

Answer.

Order for Pretrial Proceedings.

Amended Answer and Counterclaim.

Notice to take Deposition upon oral examination.

Defendant's Law Memorandum.

Reply to Counterclaim.

Defendant's Pretrial Opening Statement.

Plaintiff's Memorandum of Law.

Plaintiff's Supplemental Memorandum of Law.

Government's Analysis of Stipulation of Joint Exhibit 2-B.

Stipulation re Computation.

Plaintiff's Second Supplemental Memorandum of Law.

Minute Order 12/19/57.

Minute Order 12/20/57.

Minute Order 12/23/57.

Minute Order 12/26/57.

Opinion.

Motion for New Trial.

(Copy.) Proposed Findings of Fact, Conclusions of Law and Judgment, lodged 2/14/58.

(Copy.) Memorandum for Computation of Judgment.

Objections to proposed Findings of Fact and Conclusions of Law.

Defendant's Reply to the objections to proposed Findings of Fact and Conclusions of Law.

Affidavit of Service by Mail re Defendant's reply to the objections to proposed Findings of Fact, etc.

Motion for New Trial and Motion to Amend and make Additional Findings of Fact and Conclusions of Law.

Plaintiff's Memorandum in opposition to Motion for New Trial and Motion to Amend and make Additional Findings of Fact and Conclusions of Law.

Findings of Fact, Conclusions of Law and Judgment.

Order Denying Motions for New Trial and Motion to Amend and make Additional Findings of Fact and Conclusions of Law.

Affidavit of Service by Mail re motion for extension of time to docket cause on appeal and order.

Notice of Appeal.

Motion for extension of time to docket causes on appeal and order, filed 6/5/58.

Designation of Contents of Record on Appeal.

Motion for extension of time to docket causes on appeal and order thereon, filed 7/11/58.



(Copy.) Letter dated 3/13/58 from Judge Kaufman re denial of motion for new trial.

B. Plaintiff's Exhibits—1, 2, 3-A, 3-B, 3-C, 3-D, 4-A, 4-B, 4-C, 5, 6, 6-A, 7, 8 and 9.

Defendant's Exhibits—A, B, C, D, E, F, G, H, H-1, I, J-1, J-2, J-3, J-4, J-5, J-6, J-7, J-8, J-9, K, L, M-1, M-2, M-3, N-1, N-2, O and P.

C. Reporter's Transcript of Proceedings had on: 12/19/57, 12/20/57, 12/23/57 and 12/26/57.

I further certify that my fee for preparing the foregoing record, amounting to \$2.40, has not been paid by appellant.

Dated: July 14, 1958.

[Seal]                      JOHN A. CHILDRESS,  
Clerk;

By /s/ WM. A. WHITE,  
Deputy Clerk.

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[Endorsed]: No. 16106. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Herbert D. Hover, Doing Business as Ciro's, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: July 21, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals for the  
Ninth Circuit

No. 16106

UNITED STATES OF AMERICA,

Appellant,

vs.

HERBERT D. HOVER, dba CIRO'S,

Appellee.

STIPULATION RE USE OF  
ORIGINAL EXHIBITS

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel of record, as follows:

1. That the exhibits admitted into evidence in The Trial Court are voluminous in number and include several schedules large in size and newspaper clippings difficult to reproduce.

2. That the expense of reproducing the exhibits in the printed record would be considerable, and difficult of attainment in a form easily legible.

3. That it is agreeable to the parties that the exhibits be considered by the Court in the original form and referred to in the briefs of the parties.

4. That this stipulation is without prejudice to either party designating one or more of the exhibits for printing in the appellate record.

5. That all of the exhibits introduced into evidence in the Trial Court, that is, Exhibits 1 through 7, inclusive, and A through P, inclusive, are material to the consideration of the appeal and may be considered by the Court in original form and need not be printed.

Dated: July 22, 1958.

LAUGHLIN E. WATERS,  
United States Attorney;

EDWARD R. McHALE,  
Assistant U. S. Attorney  
Chief, Tax Division;

/s/ EDWARD R. McHALE,  
Attorneys for Appellant.

/s/ ERNEST R. MORTENSON,  
Attorney for Appellee.

[Endorsed]: Filed July 24, 1958.

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[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF POINTS UPON  
WHICH APPELLANT INTENDS TO RELY  
[Rule 17.6]

Comes Now the appellant, the United States of America, pursuant to Rule 17.6 of this Court, and states that it intends to rely upon the following points in its appeal of the above-entitled case:

1. The District Court erred in failing to award judgment for the defendant on its counterclaim in the full amount prayed for, \$81,819.07, together with interest according to law.

2. The District Court erred in concluding that the statute imposing the cabaret tax was not intended to cover all the amounts paid for admission, refreshments, service or merchandise by or for those patrons of *Ciro's* who were entitled to be present during any portion of the public performance and in concluding that the tax was limited only to those amounts paid for refreshments, service and merchandise served during the time of the performance. (Concls. Law Para. I, IV.)

3. The District Court erred in concluding that the words, "entitled to be present" in the applicable statute did not apply to the Pavillion Room or *Ciroette* Room parties. (Concls. Law Para. 11.)

4. The Court erred in concluding, with respect to the Pavillion Room operation, that the amount of tax applicable to the drinks served after 10:30 p.m. is a proper measure of the tax. (Concls. Law Para. IV.) Appellant submits that the evidence is undisputed that the appellee failed to maintain records required by law showing the amounts paid by or for the patrons entitled to be present and has failed to sustain his burden of proof of showing the assessment was erroneous. Because of that, the entire amount of the tax assessed against the Pa-

villion Room was proper and should have been adjudged due and owing the United States.

5. The District Court erred in concluding that the tax assessment on five per cent of the Ciroette Room's receipts was improper. (Concls. Law Para. V.)

6. The District Court erred in concluding, with respect to the "Closed House Parties," that the payments received by Ciro's did not entitle the patrons or guests to be present during public performances for profit. (Concls. Law Para. VII.)

7. The District Court erred in concluding that upon the occasions in which the public was admitted to the "Closed House parties," that the receipts of the "Closed House parties" were not subject to the cabaret tax. (Concls. Law VI.)

8. The District Court erred in failing to conclude that plaintiff's failure to make and keep adequate records (Finding III, R. 103), of the amounts paid by or for those patrons or guests of the Pavillion Room for food, refreshment or merchandise who witnessed the entertainment, was in dereliction of Treas. Reg. 43 § 101.32(b), (1)-(4) inclusive, and thus, was fatal to his bearing his burden of proving the Commissioner's assessment of the tax on the Pavillion Room was erroneous.

9. The District Court erred in denying each of the defendant's motions for new trial, for each and every one of the grounds set forth therein, which are herein incorporated by reference.



10. The District Court erred in denying the defendant's Motion to Amend and Make Additional Findings of Fact and Conclusions of Law, for each and every one of the grounds set forth therein, which are herein incorporated by reference.

11. The evidence was insufficient to justify the following determinations of the District Court set forth in its Opinion and said determinations are clearly erroneous:

(a) Upon conclusion of the floor show, most of the guests at the private parties of the Pavillion Room left the building.

(b) The patrons by or for whom the charges in the Pavillion and Ciroette Rooms were incurred were seemingly members of private parties.

(c) The 304 parties in dispute with respect to the Pavillion Room were private up to 10:30 p.m.

(d) The operation of these so-called private parties is not so intimately related to the general operation of the Main Room, and the viewing by the Pavillion Room guests of the entertainment at 10:30 p.m. such an integral part of their evenings activities, that it can be reasonably inferred that the compelling motive in reserving the use of the Pavillion Room was for the purpose of seeing Ciro's entertainment.

(e) The private groups availing themselves of the facilities of the Pavillion Room did not consider themselves as part of the public patronage of

Ciro's and any intent on their part of being assimilated into the general over-all cabaret atmosphere of *Ciro's* was of incidental significance in their decision to conduct their parties in the Pavillion Room.

(f) The receipts prior to the removal of the separation in the Pavillion Room and the commencement of the floor show are outside the scope of the cabaret tax and were improperly included within the assessment.

(g) That \$5,200.63 represents the correct tax assessment on the Pavillion Room operation.

(h) The amount of drinks served after 10:30 p.m. rather than the payments received for food, refreshment and merchandise, whenever sold, represent the correct measure of cabaret tax liability.

(i) The tax assessment on 5% of the *Ciroette* Room receipts is improper.

(j) With respect to the Closed House parties, the entertainment was furnished by the private groups rather than by *Ciro's*.

(k) That *Ciro's* did not furnish the entertainment on the 20 evenings in issue.

(l) That on 6 of the 20 nights in question the private groups had concluded their parties and surrendered the premises before the general public was admitted.

12. The District Court erred in determining that the United States is entitled to any less than the

full amount of tax assessed with respect to the Pavillion Room, because plaintiff failed to make and keep adequate and sufficient records of the amounts paid by or for patrons or guests of the Pavillion Room for refreshment, service and merchandise, who witnessed the public performance for profit and, consequently, failed to overcome the presumption of the validity of the Government's assessment of the tax.

13. In its Opinion, the District Court erred in construing the statute imposing the cabaret tax, and, most particularly, in not concluding that all of the amounts paid by or for the patrons or guests of the Pavillion Room entitled them to be present at a public performance for profit and thus, were subject to the tax. (Opinion—R.105-114, 116-117.)

14. The District Court erred in failing to find and conclude that the desire to be present at the cabaret performance was the major consideration for the groups in question to engage the facilities of Ciro's cabaret, whether they were: the Main Room, the Pavillion Room, the Ciroette Room, or the entire facilities of the cabaret for the so-called "Closed House parties."

15. The District Court erred in failing to conclude that the failure of plaintiff to come within the exception of § 101.14(c) of Treas. Reg. 43 is dispositive of the entire issue raised by the tax upon the Pavillion Room receipts.

16. The District Court erred in failing to adopt the following findings proposed by the defendant which are supported by the substantial weight of the evidence (commencing at R. 130): XIII; XIV; XV; XVI; XX; XXI; XXII; XXIV; XXV; XXIX; XXXI; XXXIII; that portion of XXXVII beginning with the second sentence through the end; XXXVIII; XXXIX, and the last sentence of paragraph XL.

17. The District Court erred in making its Findings of Fact XIX, XX, XXXI, and XXXII in that said findings are contrary to the evidence and are clearly erroneous.

Dated: July 25, 1958.

LAUGHLIN E. WATERS,  
United States Attorney;

EDWARD R. McHALE,  
Assistant U. S. Attorney,  
Chief, Tax Division;

/s/ EDWARD R. McHALE,  
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 26, 1958.